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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY and PAULA JEANNE FELDMAN, as Personal Representative of the ESTATE OF ABRAHAM FELDMAN,

Petitioners,

v.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PAUL E. SLATER *
BRUCE S. SPERLING
STEPHEN J. SPITZ
SPERLING, SLATER & SPITZ
55 West Monroe Street
3300 Xerox Centre
Chicago, Illinois 60603
(312) 641-3200

Attorneys for Petitioners

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

90pp

QUESTIONS PRESENTED

The Seventh Circuit (Posner, J.) reversed a $36 million jury verdict, and directed that judgment be entered for the defendant-monopolist in an antitrust case that it acknowledged is "generically similar" (App. B at 27) to *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S.Ct. 2847 (1985).

1. The basic question for review is whether the appellate court's decision directly conflicts with *Aspen*. The specific questions presented are:

A. Whether a monopolist, who has been participating in a joint marketing program with its smaller competitors, may, as a matter of law, terminate that program for the purpose and with the effect of injuring competition and consumers, and without any efficiency justification for doing so, because the monopolist had no general duty to enter into the program in the first instance.

B. Whether a monopolist may, as a matter of law, stop cooperating or dealing with its smaller rivals, for the purpose and with the effect of excluding competitors and causing consumers to pay higher prices, without any efficiency justification for doing so, because such cooperation or dealing is not "indispensable" to competition.

C. Whether the appellate court can re-decide factual issues in a monopolization case, pertaining to both liability and damages, by holding inter alia, that it is for the court to determine, as a matter of law, whether a monopolist's conduct is "objectively anticompetitive" and whether such appellate fact finding is warranted by *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986).

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OPINIONS BELOW

The decision by the District Court (App. C) is unreported. The Court of Appeals' opinion is reported at 797 F.2d 370 (App. A). The Court of Appeals' opinion denying the petition for rehearing is reported at 802 F.2d 217 (App. B).[1]

[1] References to the trial transcript are cited as "T____"; references to petitioners' trial exhibits are "PX____." Petitioners, three interrelated entities, hereinafter referred to as "Olympia" or "plaintiff," have no subsidiaries, parents or affiliates.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1986. On October 6, 1986, a petition for rehearing with suggestion for rehearing *en banc* was denied. On December 19, 1986, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including January 25, 1987. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2 (Supp. IV 1980); Section 4 of the Clayton Act, 15 U.S.C. §15 (Supp. IV 1980).

STATEMENT OF THE CASE

A. Western Union Opens The Market

Prior to 1971, there were two public-access teletypewriter communications systems. Respondent, Western Union Telegraph Co. ("WU"), offered Telex, and AT&T offered TWX. Both systems had two parts: 1) the access line network, and 2) a leased teletypewriter terminal, used to send and receive messages.

In 1971, WU acquired its only competitor, TWX. The jury found, and the appellate court agreed, that WU thus

obtained monopoly power in a relevant market for the access line service. App. A at 5-6; App. B at 27. As a condition of allowing WU to acquire TWX, the FCC required it to open the market for providing Telex/TWX terminal equipment to competition.[2] App. A at 3. Prior to this time there was no competition in the terminal market. When a customer ordered the Telex or TWX service, he paid one tariffed price and automatically received the service and a leased terminal.

To open the terminal market, WU told the FCC that it would "unbundle" its tariff and offer the terminal and the access line separately. It also told the FCC it would open the terminal market to competition from independent vendors and institute an "impartial referral program." (T2843-45, PX285).

To keep those promises, in 1973, WU created the formal Customer Provided Terminal Program ("CPT Program"). (PX 286). Under this program, WU encouraged prospective vendors to enter the terminal market. App. A at 3. At the heart of the CPT Program was WU's representation to the vendors that it would pass out a vendor list. WU "told [the vendors] . . . it would put them on a list which its salesmen would give new subscribers . . . who were seeking terminals." *Id.*

Aside from its statements to the FCC, WU had a second reason for instituting the CPT Program. It planned to expand its access line network and its new customers would require thousands of new terminals. WU did not

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[2] The jury and trial court found that providing terminal equipment to Telex/TWX users was a relevant product market or submarket that WU had unlawfully monopolized. App. C at 33. The Court of Appeals held that since WU enjoyed monopoly power in the access line market, it need not consider whether WU had monopoly power in the terminal market as well. App. A at 7-8.

want to spend the capital necessary to purchase these terminals. It feared that the terminals would become obsolete and preferred to spend its available capital on expanding the access line system. Thus, WU wanted independent vendors to invest their capital in the needed terminals.

WU did not, however, plan to withdraw from the terminal market. It merely planned to stop buying new terminal equipment. In 1973, WU had over 90,000 terminals on lease with users. Each year 18% of its users cancelled the access line service and returned the leased terminals to WU. (T4434). Thus, without purchasing any new terminals, WU would have about 16,000 used terminals to place in the market each year. While WU planned to sell (as opposed to lease) some of its terminals from time to time, it never planned to sell its entire terminal stock.[3] Indeed, WU was careful to tell the vendors in writing: "We are not getting out of the terminal business. A [WU] tariffed terminal offering will continue to be available." (PX286). Consistent with this statement, from 1973 to the date of the trial in 1985, WU did not exit the terminal market and remained, by far, the largest supplier of terminals. In fact, WU rejected offers to purchase its entire terminal portfolio. (T1121).

In 1973, based on the CPT Program, vendors began entering the market. They offered the same type of terminal as WU, but their equipment was new and generally priced 7% to 25% below WU's. (PX16, PX298, PX1356; T2940-42, 5148). WU admitted that its terminals were competitively inferior to the lower-priced, better quality vendor equipment. Brief of Defendant-Appellant at 26, n.20. The Seventh Circuit agreed that plaintiff's "ter-

[3] For example, the 1975 WU business plan called for the sale of approximately 9,000 terminals. (PX11; PX150).

minals were newer and cheaper than Western Union's . . . inferior product." App. A at 15.

In August, 1974, plaintiff Olympia, in reliance on WU's written and oral statements that it would hand out a vendor list (T638-43), entered the CPT Program and within a year became the largest independent vendor in the terminal market. By September, 1975, it had placed 1800 terminals and was capturing 20% of the market. App. A at 4. WU executives admitted plaintiff became the "biggest and best" vendor, and that many new customers, when given a choice, preferred to obtain plaintiff's terminal because it was new, lower priced and could be delivered more quickly than WU's. (T501-02, 1125-27, 3671-73).

The CPT Program worked fine for several years (T1368-72) and a competitive market featuring price and quality competition from the vendors developed. (T4617). For this competition to continue, it was necessary that WU continue to pass out the vendor list. Due to its control of the access line market, there was no practical way for the customers to contact the vendors or vice-versa. The identity of the new access line customers was known only to WU, not to the vendors (T283); and, conversely, the customers knew only of WU, and were generally unaware that they could obtain a terminal from anyone else. (T510, 3677).[4] As a result, if the vendor list was not passed out, the WU access line salesmen could completely control the terminal sale. (PX78A; T4569-73). As WU admitted, if it did not hand out the vendor list, "the vendors had no

[4] WU argued at trial that the vendors could compete by leasing terminals to existing access line users who had already leased terminals from WU. These users were identified in the Telex Directory, but, as the jury found, they had already satisfied their need for a terminal and were not expressing any demand for another one.

chance" (T4573-74) and could not effectively compete. (T4572-85).

Furthermore, as WU knew, the vendors had virtually no salesmen of their own[5] and depended upon WU salesmen to pass out the vendor list. For providing this service, plaintiff offered to pay WU a sales commission but WU declined the offer. (T1121-22).

B. WU Closes The Market

By the spring of 1975, the availability of terminals from plaintiff and other new entrants became more widespread and customers began to select the newer, lower-priced vendor terminals in increasing numbers. As a consequence, WU was unable to lease all of the terminals returned to it, and its inventory of used terminals began to build up.

Rather than responding to its inventory build-up by reducing its price, WU simply terminated the CPT Program. On September 1, 1975, WU secretly directed its sales force to stop handing out the vendor list. App. A at 4, 15; App. B at 26. The consumers were no longer informed of the cheaper and newer vendor equipment and, as a practical matter, had no opportunity to select a vendor terminal. The vendors, however, were told that there had been no change in the CPT Program.

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[5] Out of more than 35 vendors, the only two who were shown to have *any* salesmen of their own were Siemen's, a manufacturer of a "heavy-duty" terminal , who had two salesmen (T5342), and Trans-Lux, another terminal manufacturer who had a handful of salesmen. (T4448-50). WU admitted that Trans-Lux and Siemen's had *de minimis* placements and were not a significant factor in the terminal market. (T4598-99).

On the same day WU stopped handing out the vendor list, it also raised its prices an additional 18%. (PX367).[6] Nonetheless, due to the termination of the CPT Program, WU's share of the relevant terminal product market jumped from 22% to 72% almost immediately. App. A at 4. By December, 1975, it had reached 82%. (PX11). The vendors, with superior equipment at lower prices, were reduced to 17.9% of the market.[7]

The termination of the CPT Program had a devastating effect on the vendors. (T3674). Olympia was driven out of business. Vardon & Associates, the second largest vendor, was also driven from the market. (T275). Placements by other vendors went to practically nothing. (T3674).[8] WU was aware that this would be the effect of it terminating the CPT Program. A WU executive even admitted that he told plaintiff, "the [vendor] business is dead; sell out; take your loss; there is nothing left." (T1861).

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[6] Plaintiff also raised its price in September, 1975, but at all times was below WU's price.

[7] At trial, WU argued it was out of terminals in the summer of 1975, and therefore had changed its sales commission schedule to favor the placement of vendor terminals. It argued further that it never stopped handing out the vendor list and that the sudden drop in vendor placements in September, 1975, was caused by a change in the salesmen's commission schedule so as to no longer favor the vendor terminals. The appellate court, however, found that WU directed its sales force to withhold the vendor list. Furthermore, the uncontested evidence was that WU was never out of inventory in the summer of 1975; that the highest number of commission points was always for the sale of a WU terminal; and, the incentive was never to place a vendor terminal first. (T4601, 4612-13).

[8] The few sales the vendors were able to make are accounted for by the fact that WU had occasional inventory shortages on either Telex or TWX machines at various local warehouses. (DX1104). Thus, there was a need to continue handing out the vendor list on a local, sporadic basis.

Following the termination of the CPT Program, plaintiff was the only vendor to attempt its own national sales effort. It hired 35 salesmen (for a total of 70 employees), opened four regional offices, and initiated a comparative advertising campaign, pointing out that its terminals were lower-priced and newer than WU's. This competitive conduct "enraged" WU. App. A at 5. As a result, plaintiff was specifically singled out for extinction ("[t]hese turkeys . . . ought to be flushed") (PX12D), and, as a WU executive admitted, the word was passed by upper management "to everyone else at WU." (T1145). Thereafter plaintiff, the largest and best vendor, neither leased nor sold a terminal through the CPT Program, even though other vendors did experience a small amount of business from the sporadic handing out of the vendor list.

C. The Decisions Below

The jury found WU liable for monopolization under §2 of the Sherman Act and for breach of implied contract under New Jersey law. The trial court denied WU's post trial motions, finding that the verdict was "overwhelmingly supported by the evidence." App. C at 40. It also held that the controlling authority was the "remarkably similar" case of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S.Ct. 2847 (1985). App. C at 35.

The Court of Appeals reversed.[9] It found no error in the jury instructions, but held that a directed verdict should have been entered for WU because its conduct was not an "objectively anticompetitive act" (App. A at 18) and could not be found to be "exclusionary." App. B at 26.

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[9] Plaintiff believes the appellate court committed plain error in reversing the contract verdict of $12 million. Plaintiff does not, however, seek review by writ of certiorari of that decision.

By Petition for Rehearing With A Suggestion For Rehearing En Banc, plaintiff argued that the appellate court had failed to follow *Aspen*. In denying the Petition, the Seventh Circuit conceded that "reasonable persons might differ on the proper interpretation of *Aspen*" (App. B at 26), but it reiterated its prior holding that if a monopolist had no duty to commence a cooperative relationship, then, as a matter of law, no liability could flow from its termination. App. A at 10; App. B at 28.

REASONS FOR GRANTING CERTIORARI

A.

THE APPELLATE COURT OPINION IS IN DIRECT CONFLICT WITH *ASPEN*.

The appellate court opinion is in direct conflict with *Aspen* in three critical respects. *First*, it incorrectly adopts an exculpatory rule, which holds that if there is no duty for a monopolist to enter into a joint marketing program, then the termination of that program cannot violate the Sherman Act. App. A at 10. *Second*, it incorrectly holds that if *Aspen* has any meaning at all, it is only that a monopolist cannot refuse to cooperate with its rivals where such cooperation is "indispensable" to effective competition. App. A at 16. *Third*, it incorrectly holds that the question of whether conduct is "exclusionary"—and other factual issues as well—can be re-decided by the appellate court, as a matter of law, without deferring to the jury's contrary findings as required by *Aspen*.

In reaching these erroneous holdings, the Seventh Circuit states that it must give *Aspen* its "most careful and respectful consideration" (App. A at 12), but it does not.

Rather, it confines *Aspen* to insignificance by holding it to be "narrowly written" and openly doubts that "it stands for any principle that goes beyond its unusual facts." App. A at 16. As one prominent commentator has noted, the Seventh Circuit merely "pay[s] lip service to the Supreme Court's opinion in *Aspen*" while "actually . . . limiting it to its facts" as it "continue[s] to lead the way in narrowly construing the antitrust laws . . . [and] grant[ing] monopolists greater and greater freedom in their business affairs." von Kalinowski, Antitrust Report (Monthly Supplement to Antitrust Law and Trade Regulation), Sept., 1986 at 3-4, App. F at 50-51.[10]

The Seventh Circuit, as an intermediate court, is bound to follow, not free to lead. As this Court stated in *Hutto v. Davis*, 454 U.S. 370, 375 (1982), ". . . unless we want anarchy to prevail within the federal judicial system, a precedent of this Court must be followed . . . no matter how misguided the judges of those courts may think it to be." Certiorari should be granted here not only to protect the precedential value of *Aspen*, but also to protect the integrity of the federal judicial system.

1. Olympia's Exculpatory Rule Is In Conflict With Aspen

In *Aspen* the defendant-monopolist operated three skiing mountains and the plaintiff operated a fourth. Because

[10] In its Petition for Rehearing, plaintiff made much the same argument. In a separate opinion, Judge Flaum conceded that there was room for "substantial, indeed spirited disagreement" as to whether *Aspen* had been properly applied. App. B at 29. Nonetheless, Judge Flaum was sharply critical of plaintiff's counsel for arguing that the appellate opinion demonstrated a philosophical opposition to the traditional antitrust analysis set forth in *Aspen* and that the Seventh Circuit had seized this opportunity to (i) narrow and confine *Aspen* to its own facts, and (ii) announce a conflicting rule structure.

skiers preferred a multi-day pass which allowed them to select from any of the four mountains, the plaintiff and defendant had for several years participated in a cooperative marketing plan whereby they offered a joint multi-day pass, usable at any of the four mountains. Then, in order to increase its sales at the expense of its smaller rival, defendant terminated the cooperative marketing program, thereby making "an important change in the character of the market." 105 S.Ct. at 2858. The plaintiff's market share fell from 20% to 11% and this Court affirmed a jury verdict for plaintiff under §2 of the Sherman Act.

The defendant in *Aspen* argued for an exculpatory rule, contending that a monopolist has no duty to help its rival by engaging in a joint marketing program, and therefore, the termination of such a program could not be unlawful. *Id.* at 2856. While the Court agreed that a monopolist is under "no general duty" to help his competitor by "engag[ing] in a joint marketing program," it also held that the monopolist was "quite wrong" in suggesting that such a proposition was dispositive. *Id.*

Rather, *Aspen* carefully distinguishes between a monopolist who initially refuses to enter into a new joint marketing program and a monopolist who terminates an ongoing program. *Aspen* states:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, [by terminating the program] the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.
>
> * * *

> Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market. *Id.* at 2858.

Aspen then clearly holds that a monopolist has no absolute right to terminate an existing joint marketing program, even though voluntarily entered at the outset. Rather, it affirms liability where such a termination can fairly "be characterized as exclusionary." *Id.* at 2858, 2859.

The Seventh Circuit, however, adopts precisely the exculpatory rule which *Aspen* rejects. Thus, *Olympia* holds that if there is no duty to enter into a joint marketing program in the first instance, *then as a matter of law* there can be no liability for terminating an ongoing program. The opinion states:

> If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? *We think not.* App. A at 10 (emphasis added).

Throughout the *Olympia* opinion, this erroneous principle is reiterated and reinforced. Thus, the Seventh Circuit states that the withdrawal from a joint marketing program is not an "objectively anticompetitive act" and cannot be unlawful "once the basic premise that monopolists are not required to help their competitors . . . is granted" (App. A at 18); and, "the law would be perverse" to penalize a monopolist for terminating a voluntary cooperative program (*id.* at 11); and, to do so "would undermine the objectives of the antitrust law." *Id.* at 8.[11]

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[11] The appellate court states that it has been cited to no case where an antitrust violation resulted from facts similar to those proved below. This ignores *Aspen* and *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grds*, 437 U.S. 322 (1978), which was cited in

(Footnote continued on following page)

Indeed, *Olympia* characterizes the joint marketing program as "special assistance" and then states that "there is no more duty to give or continue[12] such assistance than there is to lend money to a competitor." *Id.* at 12. Thus, the Seventh Circuit holds, as a matter of law, that it cannot be "anticompetitive" for a monopolist to withdraw from a voluntarily entered joint marketing program. If that rule had been applied in *Aspen*, no liability could have been found.

In conjunction with its exculpatory rule, the Seventh Circuit repeatedly states that WU merely declined to help its competitor and that such conduct cannot be unlawful. App. A at 8, 12, 18; App. B at 28. But, even the Seventh Circuit admits that this case is not about a mere refusal to help, but rather "is a case about the severing of a cooperative relationship between a firm with monopoly power and a competing firm." App. B at 27. In *Aspen*, this Court unequivocally held that such conduct is unlawful when it can fairly be found by the jury to be exclusionary. That holding cannot be avoided by characterizing WU's conduct as a mere refusal to help its competitor.

In short, the exculpatory rule announced in *Olympia* is in stark conflict with the fundamental holding in *Aspen*. If allowed to stand, it supplants *Aspen* as controlling law.

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[11] *continued*
plaintiff's appellate court brief. In the latter case, a monopolist who represented to the ICC that it would keep certain routes open to competition by advising customers of its competitor's routes, prices and schedules, was held to violate §2 because it told its ticket agents to stop doing so. *Id.* at 689, 696.

[12] Contrary to the Seventh Circuit's suggestions (App. A at 21), plaintiff never contended that WU was obligated to continue to hand out the vendor list forever, only for a "reasonable time" under the circumstances, and the jury was so instructed. Consistent therewith, the trial court in *Aspen* issued an injunction against the termination of defendant's joint marketing program for three years. *Aspen* at 2855 n.23.

2. *Aspen* Cannot Be Narrowed By An "Indispensability" Test Or Restricted To The "Essential Facility" Doctrine.

In further conflict with this Court, the Seventh Circuit holds that *Aspen* is to be construed as an essential facility case and that a §2 violation can result only when access to the essential facility is "indispensable" to competition. Thus, the Seventh Circuit states:

> The *Aspen Highlands* decision . . . is narrowly written. If it stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor *in circumstances where some cooperation is indispensable to effective competition.* App. A at 16 (emphasis added).

The Seventh Circuit then holds that the joint marketing program in *Olympia* could not be indispensable (even though the two largest vendors were driven from the market) because some vendors managed to "hang on" after its termination. App. A at 4.

No case—essential facility or otherwise—has ever required "indispensability" of the withheld product, service or facility in order for a §2 violation to result. Indeed, such a test was explicitly rejected in *Associated Press v. United States*, 326 U.S. 1 (1945). There, the defendant argued that it had not violated the law because its news service was not "indispensable" and "some competing papers had gotten along without [it]." 326 U.S. at 18. This Court rejected the argument in the strongest terms: "The proposed 'indispensability' test would fly in the face of the . . . Sherman Act. . . . It would make that law a dead letter in all fields of business. . . ." *Id.* Even true essential facilities cases unequivocally reject an "indispensability" requirement. *See, e.g., Hecht v. Pro Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) ("To be essential a facility *need not be indispensable.* . . .").

Indeed, *Aspen* itself rejects the "indispensability" test. There the Court held that conduct is unlawful if the jury can fairly characterize it as anticompetitive and if competition is "impaired . . . in an unnecessarily restrictive way." 105 S.Ct. at 2859. The Court found this test met even though plaintiff was still able to compete after the termination of the cooperative program and maintained an 11% market share. Had an "indispensability" test been applied in *Aspen*, plaintiff would have lost.[13]

Moreover, *Aspen* is not an essential facility case[14] and cannot be so confined. In *Aspen*, the Court explicitly denied reliance on that esoteric doctrine: "Given our conclusion . . . we find it unnecessary to consider the possible relevance of the 'essential facilities' doctrine. . . ." *Id.* at 2862 n.44.[15]

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[13] In any event, the evidence in *Olympia* showed that the joint marketing program was in fact indispensable to effective competition. Plaintiff's terminal orders fell from 400 a month to zero and the consumers were denied all choice and forced to pay higher prices for lower-quality goods. Competition was effectively destroyed.

[14] The Seventh Circuit, while acknowledging that *Aspen* is not technically an essential facility case, construes it as one: "[*Aspen*] is like the essential facility cases in that the plaintiff could not compete . . . without being able to offer its customers access to the defendant's larger facilities." App. A at 13; *see also id.* at 18.

[15] Nor is *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the case principally relied on in *Aspen*, an essential facility case. *Lorain Journal* is a refusal to deal case and, like *Aspen*, announces generally applicable principles of antitrust law. Indeed, this Court specifically stated that *Lorain Journal* "is not so narrow" as to preclude its application to the termination of a cooperative marketing program. *Aspen*, 105 S.Ct. at 2858. The Seventh Circuit recognizes that its analysis "might seem" to be "wrong" in light of the refusal to deal cases (i.e., *Lorain Journal*), but holds those cases to be inapposite to the termination of a joint marketing program between competitors. App. A at 11. *Aspen* holds precisely to the contrary.

By holding that *Aspen* is an essential facility case that requires "indispensability" of the cooperative program, the Seventh Circuit impermissibly narrows that opinion and unduly restricts the circumstances under which a §2 violation can be found.

3. Olympia Fails To Respect The Jury's Role As Required By *Aspen* And Determines Fact Issues As Matters Of Law.

Aspen holds that the termination of a cooperative marketing program is unlawful where it can be "properly characterized as exclusionary." 105 S.Ct. at 2857, 2859. Moreover, *Aspen* repeatedly holds it is for a jury to determine whether the conduct is exclusionary and tends to restrict competition, or whether it is legitimate and furthers competition on the merits. *Id.* at 2858-59, 2860, 2861-62.[16] The Seventh Circuit, however, rejects the jury's role. It re-decides the critical facts on a *de novo* basis and alternatively treats those factual issues as questions of law for the court to determine. Thus, the court holds that there was no need to have the jury decide any issues in this case and that a directed verdict should have been entered for the defendant.

To justify its usurpation of the jury's role, the Seventh Circuit states that *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), gave appellate courts a "warning about the possible anticompetitive consequences of allowing a jury to infer monopolization from behavior that in most cases is competitive." App. A at 15. The appellate court then announces a new rule—that conduct is unlawful only if it is "objectively anticompetitive." App.

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[16] The jury, of course, must act pursuant to correct instructions. The instructions here were remarkably similar to those approved in *Aspen* and no error was found in them.

A at 16, 18. This rule is nowhere to be found in *Aspen*, and apparently is intended to allow the appellate court to re-decide, as a matter of law, whether conduct is exclusionary.

Nothing in *Matsushita* warrants this intrusion on the jury's role as required in *Aspen*. In *Matsushita*, the Court made clear that its decision addressed only the procedural standards for summary judgment and the lack of sufficient evidence of the unique "conspiracy" alleged in that case. It did not, in derogation of *Aspen*, give the appellate courts carte blanche to disregard the jury's primary role in determining whether conduct is exclusionary in a monopolization case.[17]

Specifically, *Aspen* holds that in determining whether the termination of a joint marketing program is "exclusionary," the *jury* is to consider three factors: 1) the effect on defendant's smaller rivals; 2) the effect on consumers; and 3) whether the conduct can be justified on the basis of efficiency on legitimate competition or the merits.[18] 105 S.Ct. at 2859-60. As demonstrated below, the Seventh Circuit holds each of these factual issues to be either irrelevant or to be a question of law which it can re-decide on appeal.

(i) Effect On Plaintiff's Ability To Compete.

In *Aspen* the plaintiff's market share fell from 20% to 11% even though it tried to protect itself from a loss of

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[17] This misuse of *Matsushita* has been foreseen by commentators. *See* Crew, *Matsushita v. Zenith: The Chicago School Teaches The Supreme Court A Dubious Lesson*, Antitrust, ABA Antitrust Section, Fall 1986, at 11.

[18] In order to return a verdict for plaintiff, the instructions in this case required the jury to make a finding favorable to plaintiff on each of these three factors. (T6423-24, 6429-30).

business by instituting an alternative ticket plan. This evidence was found to support the jury's conclusion that defendant's conduct was exclusionary. *Id.* at 2860.

In *Olympia* the exclusionary effect on plaintiff was far worse. Plaintiff's market share fell from 20% to zero. And, when plaintiff tried to protect itself by initiating a national sales campaign and advertising that its equipment was newer and less expensive than WU's, it was targeted by defendant for extinction ("these turkeys . . . ought to be flushed"). The Seventh Circuit, however, in conflict with *Aspen*, holds that no inference as to exclusionary conduct can be drawn from this evidence because in terminating the joint marketing program WU had only "stopped helping Olympia." App. A at 16. It could be as easily argued, of course, that by terminating the "all-Aspen ticket," Aspen Ski Company merely stopped helping Aspen Highlands.

With regard to obvious intent to exclude its major competitor, the Seventh Circuit held that, too, to be without evidentiary significance: "That Western Union wanted to 'flush those turkeys' tells us nothing about the lawfulness of its conduct" since the issue of "anticompetitive intent" presents "an insoluble ambiguity." App. A at 17.[19]

Indeed, the Seventh Circuit recognizes that "of course" WU "withdrew the vendor list in order to make more money at the expense of Olympia," but in further disregard of *Aspen* holds such evidence irrelevant, as a matter of law, because the withdrawal of the vendor list

[19] *Aspen*, in direct contrast, holds that "specific intent to engage in predation" is relevant and is "not so difficult of proof as to render the test overly hard to meet", 105 S.Ct. at 2860-61, n.39.

could not be an "objectively anticompetitive act." App. A at 18.[20]

(ii) Effect On Consumers.

Aspen holds consumer injury was shown because skiers were denied an opportunity to purchase a superior product and, as a practical matter, prevented from exercising "their own choice on . . . matters of quality." 105 S.Ct. at 2861.

In *Olympia* the effect on consumers was far worse. As a result of WU's conduct, consumers were denied a competitive choice and, as a result, paid higher prices for lower quality goods. The Seventh Circuit agrees with these facts, but, in conflict with *Aspen*, finds this evidence of consumer injury to be of "little significance." *Olympia* states:

> Although there is evidence that Olympia's terminals were newer and cheaper than Western Union's and that Western Union withdrew the list of vendors in order to help push its own inferior product, *such evidence has little significance.* . . . App. A at 15 (emphasis added).

The Seventh Circuit explains this startling proposition by arguing that even if monopolists act selfishly, and in some cases hurt consumers, that "in the long run [consumers] will be hurt more if juries are allowed to burden monopolists with a positive duty of assisting competi-

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[20] This holding is consistent with some academic criticism of Supreme Court decisions that make it unlawful for a monopolist to drive its small rivals out of business. One academic work has called such rulings "gratuitous" and stated that "there is nothing about competition here." R. Posner, *Antitrust Law: An Economic Perspective*, 106-07 (1976).

tors."[21] App. A at 15. This, of course, is an impermissible substitution of theory from the Chicago School of Economics[22] for the jury fact-finding mandated by *Aspen*. Without a single fact of record to support its conclusion, the Seventh Circuit holds, *as a matter of law*, that in the long run, no anticompetitive consumer injury can result from the termination of a joint marketing program. That holding is at war with *Aspen*.

(iii) Legitimate Business Justification.

Aspen holds that an attempt to exclude competitors "on a basis other than efficiency" or by conduct that "does not further competition on the merits" is exclusionary and cannot be justified as legitimate business behavior. 105 S.Ct. at 2859, 2860-61, and n.39. In *Olympia* defendant did not compete on the merits by offering a better product or lower prices and it did nothing to organize its business more efficiently. It merely denied consumers the practical opportunity to make a competitive choice.

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[21] The belief that jury fact finding is an unreasonable burden on monopolists is consistent with the view, held by some, that juries are not to be trusted in antitrust cases. R. Posner, *Antitrust Law* at 235 ("most jurors are insufficiently sophisticated . . . to decide antitrust cases intelligently").

[22] The author of the panel opinion, Judge Posner, is widely recognized as a leading proponent of the Chicago School of Economics. Adherents of the Chicago School perceive *Aspen* as a major setback. *See, e.g.*, Easterbrook, *Treble What?*, 55 Antitrust L.J. 95, 97-98 (1986). There are prominent critics of the Chicago school who do not share its laissez-faire beliefs. *See, e.g.*, Sullivan, *Antitrust, Microeconomics And Politics: Reflections On Some Recent Relationships*, 68 Calif. L.Rev. 1, 10 (1980) ("There are significant deficiencies in Chicago theory. Any claim that Chicago analysts hold the butterfly of truth secure in the net is sheer hubris."); Spivack, *The Chicago School Approach To Single Firm Exercises of Monopoly Power: A Response*, 52 Antitrust L.J. 651, 669-72 (1983).

The Seventh Circuit does not find that WU did anything to compete more efficiently or on the merits. It nonetheless finds, as a matter of law, that WU had a "clear business justification" simply because "WU wanted to liquidate its supply of Telex terminals." App. A at 14.

This holding is not only wrong, it is dangerous. All monopolists want to increase their sales. Indeed, in *Aspen*, defendant terminated the joint marketing program in order to increase its sales at the expense of its rival. 105 S.Ct. at 2852. If a desire to increase one's sales is a "clear business justification" which precludes a finding of exclusionary conduct, then not only is *Aspen* overruled but §2 of the Sherman Act is effectively repealed.[23] Every monopolist could justify the exclusion of his competitors on the ground that he wanted to sell more of his own product. The Seventh Circuit holding, which would allow such a result, is patently incorrect and must not be allowed to stand as viable precedent.

4. The Seventh Circuit, Continuing Its Appellate Fact Finding, Re-Decides The Damage Issues.

Aspen held that the "size of the [jury's] damage award" also served to confirm the substantial exclusionary effect upon plaintiff. 105 S.Ct. at 2860. The Seventh Circuit, however, not only ignores the evidentiary significance of the jury's damage award, but proceeds to decide the damage facts *de novo*. In doing so, it does not hold that any damage evidence was improperly admitted, or that the damage instructions were wrong. It simply launches into an inaccurate and speculative discussion of damages and

[23] Such a result would meet with the approval of critics who have called for the repeal of §2 of the Sherman Act. *See* R. Posner, *Antitrust Law* at 212, 216 ("There is no place in a rational system of antitrust law for a separate doctrine of monopolization.")

re-decides these issues, including the trial court's discretionary remittitur decision. App. A at 22-24.

The plaintiff requested $54 million. The jury awarded $24 million, and the trial court remitted it to $12 million. The appellate court somehow finds that plaintiff's damage expert "dazzled" the jury and that the trial court's remittitur was "irrational." This conclusion is based on the appellate court's finding that the requested amount and the remitted amount would constitute huge and irrational returns of 191% and 42% respectively. App. A at 22, 24.[24] These figures, however, represent the total return accumulated *over a ten year period.* On an annual basis they are 19% and 4% respectively, which are hardly excessive rates of return on a risky equipment leasing business. Indeed, over the ten-year period, a "riskless" T-Bill would generate a return of 125%, or three times what the appellate court holds to be "excessive" *as a matter of law.*

The appellate court also finds that the plaintiff's "enterprise" originally "projected total profits over ten years of only $1.4 million." App. A at 22.[25] This, too, is indisputably wrong. Plaintiff's "enterprise" consisted of three interrelated entities, as the court of appeals acknowledged. App. A at 1. The $1.4 million projection is for only *one* of the three entities. (PX44). The projection *for all three* was a little more than $12 million (PX956, PX414), or almost exactly the remitted amount chosen by the trial court.[26] For having chosen an amount supportable for *all*

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[24] WU never advanced this argument. It is set forth by the Seventh Circuit, *sua sponte.*

[25] WU never advanced this argument, either.

[26] Even these projections were for only 3200 terminals (in addition to the 1800 already placed). Plaintiff's business plan, however, was to place 10,000 more terminals. (T1000). This would still be less than 10% of the Telex terminals in use. (PX 1129).

three entities, the trial court's remittitur decision is criticized by the panel as being without "reason," "too much" and "contrary to all the probabilities." App. A at 24. It was the appellate court, however, which completely misread the evidence.

This improper and unwarranted criticism of the trial court illustrates beautifully the wisdom of refraining from *de novo* fact-finding on appeal. The trial judge's and the jury's findings are entitled to substantial respect *and weight* and, as this Court recently held, may not be cavalierly disregarded. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985) ("the trial on the merits [is] 'the main event' . . . [not] a 'tryout on the road' ".).

5. The Seventh Circuit's Efforts To Distinguish *Aspen* Are Without Merit.

The Seventh Circuit concedes that *Olympia*, like *Aspen*, "is a case about the severing of a cooperative relationship between a firm with monopoly power and a competing firm." App. B at 27. Under *Aspen* the only remaining question is whether the jury can fairly characterize the conduct as exclusionary in light of the three factors discussed above. 105 S.Ct. at 2858.

The Seventh Circuit cannot deal with that rule structure. It attempts to distinguish *Olympia* from *Aspen* but none of its distinctions relate to whether the jury's findings on the three pertinent factors were supported by the evidence. Rather, the Seventh Circuit holds the cases distinguishable because WU had a monopoly before the joint marketing program brought competition into the market, whereas Aspen Ski Co. faced some competition at the time the All-Aspen ticket was initiated. App. A at 13-14. This "distinction" turns antitrust policy on its head, for it demonstrates only that the continuation of the cooperative program in *Olympia* was far more important to the exist-

ence of competition and the prevention of monopoly than it was in *Aspen*.

The appellate court also asserts, repeatedly (and incorrectly) that in this case WU was only trying to leave the market.[27] The illegal act in this case, however, was the termination of the CPT Program. That was not done to leave the market—it was done, as the Seventh Circuit concedes (App. A at 3, 15, 18) to increase WU's sales. At the very least, WU was attempting to use its monopoly power to keep all of its inferior, over-priced terminals in active use, while it gradually sold off its inventory over a decade or more.

Finally, the Seventh Circuit argues that in *Aspen* plaintiff could not purchase more ski mountains, but in *Olympia* plaintiff could hire salesmen. App. B at 28. This, however, is merely a refrain on the incorrect "indispensability" test. Moreover, it is analytically wrong. WU's monopoly power emanated from its control of the access line market, not plaintiff's lack of a sales force, and plaintiff could no more acquire an access line system than the plaintiff in *Aspen* could acquire another mountain. In both cases, although plaintiff could (and did) attempt alternative marketing efforts, those efforts could not practically diffuse the monopoly power that had been asserted for exclusionary purposes.

In short, the distinctions relied upon by the Seventh Circuit do not meet the holding in *Aspen*. As in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533,

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[27] As previously explained, *supra* at 4, WU stopped buying new terminals, but intended to, and did, stay in the market by releasing terminals returned to it by cancelling customers. In fact, WU remained the largest supplier in the market at all times prior to trial and rejected offers to buy its entire portfolio. None of these facts are in dispute.

535 (1983), the appellate court here "has simply confused the factual contours of *Rice* [a controlling Supreme Court precedent] for its unmistakable holding."

Thurston also makes clear that the Seventh Circuit's error cannot be remedied by questioning the precedential effect of *Aspen* (*i.e.*, "narrowly written" and not standing "for any principle beyond its unusual facts"). In *Thurston* the appellate court recognized *Rice* as a "most troublesome precedent" and "doubt[ed] that [it] is still good law." This Court answered:

> Needless to say, only this Court may overrule one of its precedents. Until that occurs, *Rice* is the law, and the decision below cannot be reconciled with it. The petition for certiorari is granted [and] the judgment of the Court of Appeals is reversed. . . . 460 U.S. at 535.

This teaching is applicable to the current case. *Aspen* is the law and the decision below cannot be reconciled with it.

B.

REVIEW OF THE DECISION BELOW IS IMPORTANT TO THE ADMINISTRATION OF OUR NATIONAL ANTITRUST POLICY.

Olympia, as previously discussed, is in direct conflict with *Aspen*; indeed, as von Kalinowski points out, it merely pays "lip service" to the Court's opinion. App. F at 54. By itself, this warrants certiorari to protect the integrity of the judicial system.

But, *Olympia* does much more than conflict with *Aspen*. It is a broad-ranging opinion which announces new principles of antitrust law and sweeps away decades of this Court's precedent. If allowed to stand, these new rules will substantially limit the enforcement of antitrust laws and "grant monopolists greater and greater freedom in

their business affairs." von Kalinowski, *supra.* App. F at 54. Moreover, having been decided in the face of *Aspen, Olympia* will be interpreted by businessmen, lawyers and the courts as a signal that firms with monopoly power may move to exclude their competitors so as to extract higher prices for inferior goods—all without an efficiency-based justification.[28]

Thus, *Olympia*'s "indispensability test" allows a monopolist to deprive its competitors of goods, services or facilities for the purpose and with the effect of injuring competition and consumers. To do so, all a monopolist need do is show it was *possible* for some competition to continue (i.e., some competitors were able to "hang on" App. A at 4). No longer will it be decisive that the challenged conduct "impaired competition in an unnecessarily restrictive way." *Aspen,* at 2859; *Associated Press v. United States* ("the proposed 'indispensability' test flies in the face of the Sherman Act"); *Lorain Journal Co. v. United States, supra.*

The "exculpatory rule" announced in *Olympia* likewise allows a monopolist, who had been cooperating in some way with its rivals almost total license to terminate that cooperation. If the cooperation was voluntarily initiated, then the joint marketing program or other cooperative relationship may be terminated, regardless of how dependent the market had become on the cooperative program and regardless of the intended or actual injury imposed on consumers or competitors.

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[28] As previously discussed, this case cannot be meaningfully distinguished from *Aspen.* But even if it could, certiorari should be granted to allow review of the dramatic change in antitrust rule structure announced in *Olympia.*

The "business justification" rule announced in *Olympia* will be interpreted as creating an exception to the law of monopolization which virtually consumes §2 of the Sherman Act. Conduct, heretofore prohibited as anticompetitive, will be held "justified" and not "objectively anticompetitive" whenever a firm seeks to increase its own sales. A monopolist's desire to increase its own sales at the expense of its smaller rivals has never before been a justification for anticompetitive conduct; it is most often the very reason for such conduct.

Finally, *Olympia*'s rejection of the jury's fact finding role has its own far-reaching implications. It holds that *Matsushita* is a broadly based warning about the dangers of allowing jury fact finding in monopolization cases. This interpretation of *Matsushita* will be used to justify greater and greater intrusion by appellate courts on the fact finding process in all antitrust cases.

The Seventh Circuit is widely perceived as leading the nation in narrowing the antitrust law in favor of laissez-faire, free-market policies. *Olympia* is a major antitrust case involving a large jury award, and has already received substantial attention. Based on its novel rule structure, the Seventh Circuit rejects the trial court's holding that the jury's verdict was supported by "overwhelming evidence" and orders that judgment must be entered for the defendant-monopolist. In doing so, the appellate court addresses both *Aspen* and *Matsushita*, confining the former to insignificance, and expanding the latter far beyond its intended reach. If the decision is allowed to stand, it radically limits the constraints of antitrust law and opens new doors to the suppression of competition.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued so that the judgment below may be reversed.

Respectfully submitted,

PAUL E. SLATER *
BRUCE S. SPERLING
STEPHEN J. SPITZ
SPERLING, SLATER & SPITZ
55 West Monroe Street
3300 Xerox Centre
Chicago, Illinois 60603
(312) 641-3200

Attorneys for Petitioners

* Counsel of Record

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-3150

OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY, and PAULA JEANNE FELDMAN, personal representative of the estate of Abraham Feldman,

Plaintiffs-Appellees,

v.

WESTERN UNION TELEGRAPH COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 77 C 4556—**Charles P. Kocoras,** *Judge.*

ARGUED MAY 5, 1986—DECIDED JULY 18, 1986

Before BAUER, POSNER, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* The plaintiffs, affiliated companies (now defunct) and their assignee—we shall refer to the plaintiffs collectively as "Olympia"—brought this suit in 1977 against Western Union Telegraph Company, seeking damages for monopolization and attempted monopolization under section 2 of the Sherman Act, 15 U.S.C. § 2, and for breach of contract under state law. The complaint also contained a count under section 1 of the Sherman Act, charging a conspiracy between the defendant

and its parent corporation, but this count was dropped before trial, presumably because of the Supreme Court's decision abolishing the doctrine of intra-enterprise conspiracy. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

Trial was to a jury, which awarded (after remittitur) $12 million in antitrust damages and alternatively $12 million for breach of contract. The antitrust damages were trebled as required by law, making the total judgment $36 million plus a reasonable attorney's fee. Western Union appeals. Its principal argument is that the judge should have granted its motion for judgment notwithstanding the verdict (a motion renewing Western Union's motions for directed verdict made and denied at the close of the plaintiff's case in chief and again at the close of all the evidence) on both the antitrust and the contract counts; in other words, the case should never have gone to the jury, because on the evidence presented at trial no rational finder of facts could have found either an antitrust violation or a breach of contract. Western Union also argues that the award of damages was in any event grossly excessive.

Although the trial lasted more than six weeks and produced the usual mountain of testimony and exhibits, the facts relevant to this appeal are simple. We state them as favorably to Olympia as the record permits, in view of the jury's verdict. As a natural evolution from its historic telegraph service, Western Union created "Telex," a switched message transmission service provided over communications lines owned or leased by Western Union and routed through exchanges owned by it. Western Union runs an access line from its local exchange to the subscriber's premises, where the line is hooked up to a terminal. The subscriber to the service can dial any other subscriber and, when connection is made, can transmit messages from his terminal to the other subscriber's terminal. Thus telex service is like telephone service except that the communications transmitted are messages rather than voice communications. Until the 1970s Western Union required its subscribers to lease their telex terminals from

it. It bought these terminals from the Teletype Corporation; indeed the earliest and still a common type of telex terminal is the familiar teletypewriter. The price of telex service—a price regulated by the Federal Communications Commission—was a "bundled" price, meaning that it covered both telex service and the telex terminal. In 1971 Western Union bought from AT&T a service similar to and competitive with telex—TWX. We shall refer to the two services jointly as "telex." For background and approval of the acquisition see *Western Union Telegraph Co.*, 24 F.C.C.2d 664 (1970).

Beginning with the *Carterfone* decision in 1968, the Federal Communications Commission opened the telephone terminal equipment market, historically dominated by AT&T (which like Western Union required its subscribers to lease their terminal equipment from it), to competition from independent providers of such equipment. See *Use of the Carterfone Device for Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 468 (7th Cir. 1984). Required to do the same in the telex terminal equipment market as a condition of being allowed to acquire TWX (see *Western Union Telegraph Co., supra*, 24 F.C.C.2d at 676; *Western Union Telegraph Co.*, 39 F.C.C.2d 977, 978 (1973)), and in any event wanting to sell its terminals in order to raise capital to buy communications satellites for the transmission leg of its telex and other services, Western Union in 1973 announced that it was opening the telex terminal market to competition. It unbundled its pricing of service and equipment, told its subscribers they could cancel their existing leases of terminal equipment on 30 days notice and lease or buy such equipment from anyone they pleased, and told prospective vendors of such equipment that it would put them on a list which its salesmen would give new subscribers to telex service who were seeking terminals. Western Union even held a seminar for prospective vendors to encourage entry into the equipment market. Finally, it told its salesmen to try to sell its "installed base" of terminals—the 90,000 odd terminals that it owned and had leased to subscribers—to the lessees.

Since Western Union did not plan to buy additional telex terminals, the effect of this series of steps was to put Western Union on the road to withdrawing from the telex terminal market, the withdrawal to be completed when its last terminal was sold to the lessee of the terminal. Although the FCC had insisted that Western Union open the telex terminal market to competition as a condition of being allowed to buy TWX from AT&T, it never suggested that Western Union should leave the market, whether quickly or slowly. Western Union's decision to leave was voluntary.

Olympia, formed in 1975 to take advantage of the opportunity that Western Union had opened up for independent providers of telex terminals, bought terminals from Teletype Corporation just as Western Union had done. To obtain customers for its terminals Olympia relied on referrals from Western Union's salesmen—for Olympia had no sales force of its own, being a skeletal enterprise created largely for tax reasons. And yet for a period of several months in 1975, when Western Union's schedule of sales commissions encouraged its salesmen to push independently supplied terminals and when these salesmen were routinely showing the list of independent vendors to new telex subscribers, Olympia throve, installing 1,800 terminals—20 percent of all the telex terminals installed during this period.

Then the roof caved in. Western Union decided that it was liquidating its own inventory of telex terminals too slowly. It changed the schedule of commissions to encourage its salesmen to sell more Western Union terminals, and there is evidence that it also told the salesmen to stop showing the list of vendors to its subscribers. Between August and October 1975, sales and leases of terminals by Western Union to new customers rose from about 500 a month to 1,300 while Olympia's new leases fell from 425 to zero and sales and leases by other vendors fell from 1,300 to 500. Vendors who had their own sales forces were able to hang on, as these figures show. Olympia, which previously had depended entirely on referrals

by Western Union's salesmen, tried to survive by hiring its own salesmen to solicit lessees of Western Union terminals. It hoped to persuade some of the lessees to cancel their leases. This effort to compete against Western Union's installed base enraged Western Union, which in the most dramatic document in the case announced that "these turkeys . . . ought to be flushed." But nothing was done, or had to be done. Olympia's effort failed without any additional measures by Western Union, and Olympia went out of business in 1976.

On these facts, could a rational trier of fact find that Olympia was a victim of monopolization? The offense of monopolization under section 2 of the Sherman Act requires proof of monopoly power (the power to raise prices without losing so much business that the price increase is unprofitable, see, e.g., *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986)) plus conduct designed to maintain or enhance that power improperly. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847, 2854 n. 19 (1985). Olympia's complaint also charges attempted monopolization, but in a case such as this where the plaintiff presents (as we shall see) adequate evidence of monopoly power, he can get no mileage out of charging attempted as well as completed monopolization. Conduct lawful for a monopolist is lawful for a firm attempting to become a monopolist. 3 Areeda & Turner, Antitrust Law ¶ 828a (1978).

So far as terminal equipment is concerned, viewed separately from telex service, it seems inconceivable that Western Union could have had monopoly power in 1975. Then as now a vast array of terminals was available to telex subscribers, of which the 90,000 terminals owned by Western Union were only a tiny fraction. Western Union was not even a manufacturer of terminals. It was a jobber for Teletype Corporation; and but for Western Union's position as sole provider of telex service—an essential qualification, as we are about to see—anyone else could

have bought the same terminals from Teletype Corporation and sold them in competition with Western Union.

But if Western Union had monopoly power over telex service, it could use that power to curtail competition in the complementary equipment market. Although Western Union was the sole provider of telex service after acquiring TWX in 1971, this gave it monopoly power only if there were no close substitutes for telex. Almost certainly there were. Even as far back as 1968—the Dark Ages so far as competition in the telecommunications industry is concerned—President Johnson's Task Force on Communications Policy, which recommended that Western Union be allowed to buy TWX, opined that Western Union would not obtain monopoly power from the acquisition, owing to the ready ability of consumers to substitute other services provided by AT&T. President's Task Force on Communications Policy, Final Report, ch. 6, pp. 47-49 (GPO Dec. 7, 1968). But the report of a government commission is not necessarily conclusive on the state of competition. Monopoly power is, as Western Union concedes, a question of fact on which a jury is allowed to disagree with governmental reports and other secondary materials. On the record compiled in this case, which included evidence that even a steep increase in the price of telex service would not have caused many subscribers to switch to substitute services (thus implying a low elasticity of demand for telex service, and therefore monopoly power for the firm that controlled the service—Western Union), a rational jury could have found that Western Union had monopoly power in the market for telex service; so we must repress our skepticism.

But the bare fact that a firm has monopoly power in Market X does not imply that it will have an incentive to obtain monopoly power over Y, an input into X. In general a monopolist like any other firm wants to minimize its input costs; the lower those costs are, the greater the monopoly profits it will be able to make. Therefore the rational monopolist will usually want his input markets to be competitive, for competition usually will minimize

the costs that he has to pay for his inputs. There are, however, special circumstances in which a rational monopolist may want to restrict competition in an input market; as it happens, one of those circumstances is where the monopolist's rates are regulated. Western Union's monopoly of telex service was a regulated monopoly, and a regulated monopolist may have an incentive to project its monopoly into related but unregulated markets. *Illinois Bell Tel. Co. v. FCC, supra,* 740 F.2d at 471-72; *Indianapolis Airport Authority v. American Airlines, Inc.,* 733 F.2d 1262, 1267-69 (7th Cir. 1984). The FCC regulates Western Union's telex rates but not—not directly anyway—its equipment charges. Western Union might have had an incentive to insist that telex subscribers lease their terminal equipment from it, because that might enable it to smuggle into the terminal component of its rates some of the monopoly profits from telex service itself—profits the regulators would otherwise force it to pass on to the ratepayers in the form of lower rates for telex service.

Hence if Western Union had tried to obstruct the entry of independent providers of telex terminal equipment, its conduct might very well be viewed as an abuse of its monopoly of telex service. Similar conduct by AT&T was so viewed in *Litton Systems, Inc. v. AT&T,* 700 F.2d 785, 798-800 (2d Cir. 1983). Notice, though, that the relevant market is not terminal equipment. Western Union started with a monopoly of telex terminal equipment yet had no monopoly *power* in that market apart from that derived from its monopoly of telex service—which further shows that the focus of concern should be the service, not the equipment, market. The relevant market, so far as monopoly power is concerned, thus is telex service, where Western Union did have monopoly power (or so a rational jury could find), power it could use to sew up the market for a complementary product such as telex terminals. If, to maximize its profits in its monopoly market, a monopolist restricts competition in a related market, its conduct is actionable in a suit by a firm that is the target of the abusive practice. See *Grip-Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 474 (7th Cir. 1982).

Issues of market definition and market power, however, are not critical as we view the case. Not the possession, but the abuse, of monopoly power violates section 2. And far from abusing any monopoly power it may have had, by excluding independent providers of terminal equipment from selling to its telex customers, Western Union encouraged the entry of independent providers. It did this by unbundling its telex prices, by shortening its lease terms, by ceasing to buy additional terminals, by creating a sales commission structure that encouraged its salesmen to push equipment supplied by independent providers, and by putting the names of those providers on a list for its salesmen to show new telex subscribers. Obviously none of this conduct violated the antitrust laws. The alleged violation came when, having created and nurtured new competition, Western Union stopped helping the new competitors because it found it could not liquidate its terminal inventory as rapidly as it had hoped to be able to do.

We are cited to no case where an antitrust violation has been found on such facts. The lack of precedent is not surprising. A firm that voluntarily encourages new competition in a tributary market should not be penalized by being made to pay damages under the antitrust laws. Olympia does not argue that Western Union was under any antitrust obligation to take any of the steps (other than unbundling the price of telex service and permitting cancellation of its leases) that it took to facilitate competition in the telex terminal market. The FCC required Western Union to allow competition in this market; it did not require Western Union to foster competition by subsidizing its competitors' selling costs. If Western Union had known that by taking steps to promote competition it would be laying itself open to an antitrust suit that might jeopardize its shaky solvency (as this suit has done, see *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794 (7th Cir. 1986)), it probably would not have taken them. To uphold the district court's judgment would thus undermine the objectives of antitrust law.

Opinion about the offense of monopolization has undergone an evolution. Forty years ago it was thought that even a firm with a lawful monopoly (there is no suggestion that Western Union's monopoly of telex service is unlawful) could not be allowed to defend its monopoly against would-be competitors by tactics otherwise legitimate; it had to exercise special restraint—perhaps, indeed, had to hold its prices high, to encourage new entry. So Alcoa was condemned as a monopolist because it had assiduously created enough productive capacity to supply all new increments of demand for aluminum; it would not have been condemned if by keeping its prices high it had kept demand down to a level that it could supply without increasing its capacity. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 430-31 (2d Cir. 1945) (L. Hand, J.). Later, as the emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency, see, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 19-20 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, *supra*, 784 F.2d at 1338; *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1315-16 (7th Cir. 1985); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266-67 (7th Cir. 1984); *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663-64 (7th Cir. 1982); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, No. 84-5845, slip op. at 36-39 (D.C. Cir. June 3, 1986), it became recognized that the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. "A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits . . . ." *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544 (9th Cir. 1983). With Judge Hand's opinion in *Alcoa* compare the approach of his successors in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274, 276, 287 (2d Cir. 1979).

Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches. See, e.g., *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1149 (7th Cir. 1983); *Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986). "There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter." *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 512-13 (7th Cir. 1982). So if a firm went to a monopolist and said, "Please—for the sake of competition—give me a loan so I can compete with you and make this a competitive market," and it was turned down, it could not invoke the Sherman Act. A monopolist has no duty to reduce its prices in order to help consumers, *Berkey Photo, Inc. v. Eastman Kodak Co.*, *supra*, 603 F.2d at 294, and no duty to extend a helping hand to new entrants; thus IBM "was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand. IBM need not have provided its rivals with disk products to examine and copy . . . ." *California Computer Products, Inc. v. IBM*, 613 F.2d 727, 744 (9th Cir. 1979) (citation omitted). *Berkey*, *Foremost*, and other cases make clear that a monopolist has no duty to disclose its plans to rivals in order to help the rivals compete with it.

If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? We think not. Conceivably he may be liable in tort or contract law, under theories of equitable or promissory estoppel or implied contract (of which more shortly), or by analogy to the common law tort rule that though there is no duty to help a bystander in distress, once help is extended it may not be withdrawn, at least if the effect is to make the bystander's rescue by someone else less likely. See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1202 (7th

Cir. 1983). But the controlling consideration in an antitrust case is antitrust policy rather than common law analogies. Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation. Then no firm would dare to attempt a graceful exit from a market in which it was a major seller. We can imagine, though with difficulty, an argument that a monopolist might decide to entice new firms into its market only to destroy them and so deter other firms from trying to enter. But no such diabolical scheme is ascribed to Western Union, which undoubtedly was sincere in inviting new vendors into the market and in wanting to leave the market as soon as it liquidated its inventory of terminals bought from Teletype Corporation and leased to its subscribers.

Some cases hold, however, that a firm which controls a facility essential to its competitors may be guilty of monopolization if it refuses to allow them access to the facility. We accept the authority of these cases absolutely. They are well illustrated by *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), where a wholesale supplier of electricity refused to supply electric power to a power system that competed with it in the retail electrical power market and had no other source of supply. It might seem that if a monopolist's refusal to sell his products or services to a competitor can thus be actionable under antitrust law, it must mean that monopolists sometimes do have a duty to help their competitors and that the cases which deny this proposition are wrong. But the monopolistic-refusal-to-deal cases qualify rather than refute the no-duty-to-help-competitors cases. If a competitor is also a customer his relationship to the monopolist is not only a competitive one. The monopoly supplier who retaliates against customers who have the temerity to compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition.

The present case would be an essential-facility case if Western Union had refused to supply telex service to a customer who got his terminal equipment from Olympia rather than from it, or if Olympia were a competing supplier of telex service who, like the specialized common carriers in the long-distance telephone market, depended on the owner of the local exchanges (here Western Union) to complete its service. Neither condition is satisfied. The essential feature of the refusal-to-deal cases—a monopoly supplier's discriminating against a customer because the customer has decided to compete with it—is missing here. Western Union did not withhold from one member of the public a service offered to the rest; nor was it in the habit of supplying vendor lists free of charge, and balked only when the recipient turned out to be a competitor. From the outset the vendor list was a form of special assistance rendered gratis to competitors, and there is no more duty to give or continue such assistance than there is to lend money to a competitor. Conceivably a firm in the business of making loans may not be allowed to withhold a loan from a competitor (if the lender has monopoly power), but clearly a firm that is not in that business is not required to lend money to a competitor merely because the loan would increase competition.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., *supra*, goes the furthest of any case we know toward imposing (more precisely, allowing a jury to impose) a duty under antitrust law to help a competitor; and as a recent decision by the Supreme Court it requires our most careful and respectful consideration. The Aspen Skiing Company owned three of the four mountains that make up the Aspen skiing complex. Aspen Highlands Skiing Corporation owned the fourth. The two companies had offered their customers a joint ticket, usable on all four mountains, and the suit arose because Aspen Skiing Company terminated this cooperative arrangement. The Supreme Court found that for the convenience of customers an owner of a ski mountain in a multi-mountain skiing area

normally would want to offer a ski ticket usable on any of the mountains. The joint ticket had originated at a time when there was competition among the different ski mountains at Aspen, and similar tickets were offered at other multi-mountain ski areas. 105 S. Ct. at 2858. In other words, competition required some cooperation among competitors. *Aspen Highlands* is not a conventional monopoly refusal-to-deal case like *Otter Tail* because Aspen Highlands was never a customer of Aspen Skiing Company; the skiers are the customers. But it is like the essential-facility cases in that the plaintiff could not compete with the defendant without being able to offer its customers access to the defendant's larger facilities.

Olympia analogizes access to all the major mountains at Aspen to Western Union's vendor list, and argues that just as Aspen Highlands could not survive without access to the mountains so Olympia could not survive without the list. The analogy lacks not only plausibility but also evidentiary support. There is no evidence that suppliers of telecommunications equipment customarily provide their customers with lists containing the names of competing suppliers or that without such lists a new entrant cannot compete with established firms. Although some customers of Western Union may not have known about alternative vendors, nothing prevented those vendors from acquainting the customers with their existence. Virtually by definition, a consumer will not know of the existence of a brand-new firm; but this point is not usually understood to imply a duty in existing firms to tell their customers about the new firm, even if the existing firms have monopoly power. Brand-new firms are expected to make their own way in the market, by advertising or other means of promotion. Particularly where, as in this case, the consumers are business firms rather than individuals, a new competitor should have no difficulty informing consumers of its existence.

Aspen Highlands could not acquire three more mountains in the Aspen area in order to be able to compete more effectively with the Aspen Skiing Company but

Olympia could and did hire salesmen to substitute for the Western Union sales force that had been helping it. If Western Union had tried to prevent Olympia from making the substitution it would have been guilty of exclusionary conduct. But Olympia had no right under antitrust law to take a free ride on its competitor's sales force. You cannot conscript your competitor's salesmen to sell your product even if the competitor has monopoly power and you are a struggling new entrant. Advertising a competitor's products free of charge is not a form of cooperation commonly found in competitive markets; it is the antithesis of competition. It is not found in the telecommunications industry except when required by regulatory fiat, see, e.g., *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1290 (7th Cir. 1985), and it did not originate in the telex market at a time when that market was competitive but at a time when Western Union, having acquired TWX from AT&T, had (the jury found) a monopoly of that market.

Olympia cites *Aspen Highlands* for the proposition that if a firm with monopoly power cannot give a good business justification for not cooperating with a competitor, its refusal to cooperate violates antitrust law. Conjoined with other evidence, lack of business justification may indicate probable anticompetitive effect. See 105 S. Ct. at 2859-60. But there is a clear business justification in this case: Western Union wanted to liquidate its supply of telex terminals faster, so it stopped promoting a competitor's supply. The main economic objection to monopoly is that the monopolist restricts output compared to what it would be under competition. The monopolist cannot be faulted for wanting to sell *more* output unless he is engaged in some predatory or exclusionary scheme the long-run effect of which may be to restrict output (perhaps in a different market, as in a case where the regulated monopolist takes over a related market in an effort to evade profit regulation and thus keep profits up, and output down, in the monopoly market). There is no such scheme

here; Western Union's long-run design is to get out of the telex terminal market. The defendant in *Aspen Highlands* discontinued a service that its customers valued, thus forgoing normal competitive benefits in the hope (so the jury found at any rate) of reaping long-term anticompetitive gains; there is no prospect of such gains in the unusual case—which is the present case—of a monopolist who is voluntarily relinquishing his monopoly position.

Although there is evidence that Olympia's terminals were newer and cheaper than Western Union's and that Western Union withdrew the list of vendors in order to help push its own inferior product, such evidence has little significance; the free market and not a judge or a jury decides whose products are inferior. Merely to say that Olympia's terminals were newer and cheaper is not to say that consumers should have valued them more than the terminals supplied by an established firm such as Western Union. Although a monopolist can (like the rest of us) be expected to act selfishly, and in some cases consumers will be hurt, in the long run they will be hurt more if juries are allowed to burden a monopolist with a positive duty of assisting competitors. As we said earlier, if Western Union had known that by distributing a list of rival vendors it was undertaking a journey from which there could be no turning back—a journey it could not even interrupt momentarily—it would have been foolish to have embarked. Pertinent therefore is the Supreme Court's recent warning about the possible anticompetitive consequences of allowing a jury to infer monopolization from behavior that in most cases is competitive. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1360 (1986).

The present case is fundamentally different from the other telecommunications antitrust cases in recent years. In cases such as *Litton*, AT&T was found to have obstructed its competitors in the market for terminal equipment by requiring expensive and unnecessary interfaces

between the subscriber's access line and the terminal equipment bought by the subscriber from sources other than AT&T. Like AT&T, Western Union was required by the FCC to open a terminal market that it had previously controlled to competition. But there the resemblance ends. All Western Union did in this case to "obstruct" Olympia from competing with it in the sale or lease of telex terminal equipment was to stop making referrals to Olympia. That was not obstruction (or as Olympia sometimes calls it "monopoly leveraging"), for Olympia remained free to compete by sending salesmen to call on Western Union's subscribers. This was not an illusory freedom. Firms better established than Olympia—firms that had their own sales forces—weathered the withdrawal of the vendor list. Western Union stopped helping Olympia but did not hinder it. It had no duty to use its salesman at its expense to do Olympia's selling merely because Olympia was too weak to compete successfully against Western Union with a sales force of its own. Refusing to act as your competitor's sales agent is not an unnatural practice engaged in only by firms bent on monopolization.

The *Aspen Highlands* decision, on which Olympia naturally rests the main weight of its argument, is narrowly written. If it stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition. No reasonable finder of fact could have found this factual premise satisfied in this case. The experience of the other independent vendors, competitors of Olympia and Western Electric, shows—what is anyway obvious—that Olympia did not have to use Western Union's sales force (gratis) in order to compete with Western Union.

We add, what has become an antitrust commonplace, that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors ("these turkeys") is irrelevant. See, e.g., *Ball Memorial Hospital,*

Inc. v. Mutual Hospital Ins., Inc., supra, 784 F.2d at 1338-39. The importance of intent in such fields as tort and criminal law makes it natural to suppose that it should play an important role in antitrust law as well, for an antitrust violation is a statutory tort. But there is an insoluble ambiguity about anticompetitive intent that is not encountered in the ordinary tort case. If A strikes B deliberately, we are entitled to infer, first, that A's act was more dangerous than if the blow had been accidental (you are more likely to hurt someone if you are trying to hurt him than if you are trying, however ineptly, to avoid hurting him, as in the typical accident case), and, second, that the cost of avoidance to the injurer would have been less than if the blow had been accidental; indeed, the cost of forbearing to commit an act of deliberate aggression is negative, because the act requires effort. Similar inferences would be possible in antitrust cases if the purpose of antitrust law were to protect the prosperity or solvency (corresponding to the bodily integrity of potential tort victims) of competitors, but it is not. Competition, which is always deliberate, has never been a tort, intentional or otherwise. See *Keeble v. Hickeringill*, 11 East. 574, 103 Eng. Rep. 1127 (K.B. 1706 or 1707). If firm A through lower prices or a better or more dependable product succeeds in driving competitor B out of business, society is better off, unlike the case where A and B are individuals and A kills B for B's money. In both cases the "aggressor" seeks to transfer his victim's wealth to himself, but in the first case we applaud the result because society as a whole benefits from the competitive process. That Western Union wanted to "flush these turkeys" tells us nothing about the lawfulness of its conduct.

Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers

worse off in the long run. Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants, or having extended it voluntarily a duty to continue it indefinitely. The imposition of such a duty would make firms that possessed or might be thought to possess monopoly power, however laudably obtained, timid about relinquishing that power or, having done so, timid about competing with new entrants. The question therefore is not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did, but whether such withdrawal was an objectively anticompetitive act. It was not, once the basic premise that monopolists are not required to help their competitors, but need only refrain from anticompetitive acts such as denial of access to essential facilities, is granted.

We turn now to Olympia's contract claim, which the district court, at Olympia's urging, held (and we shall assume) is governed by the contract law of New Jersey. The claim is this: Western Union's announcement that it would tell its salesmen to show new telex subscribers a list of independent providers, coupled with Western Union's active and continuous encouragement of these providers, amounted to an offer to prospective providers which Olympia accepted by marketing terminal equipment to telex subscribers, and its acceptance created a binding contract that Western Union broke by ceasing to show the list. This sounds like a straightforward application of the principle of the unilateral contract (the contract that is accepted by performance rather than communication), on which see *Association Group Life, Inc. v. Catholic War Veterans*, 120 N.J. Super. 85, 95, 293 A.2d 408, 413 (1971), modified, 61 N.J. 150, 293 A.2d 382 (1972) (per curiam)—until one reflects on its implications. Many firms make products that are complementary to other products, as a screw is complementary to a screwdriver, tires to an automobile, and telecommunications terminal equipment to telecommunications service. The provider of one com-

plement will often take steps to encourage other firms to provide the other complement, as without the complement his own product may be worthless to the consumer. On the theory advanced by Olympia in this case, every time a firm does this it invites a breach of contract suit and judgment for consequential damages ($30 million worth, the jury thought in this case), should the firm later retract its encouraging words. Suppose Western Union had merely said that it hoped other firms would start selling terminal equipment to its subscribers, but later it changed its mind and started pushing its own equipment aggressively, through deep but lawful price cuts. Would this be a breach of contract? We think not and are pointed to no authority that it would be.

Western Union did state to prospective vendors that "at the time of the access line sales by Western Union salesmen, salesman will furnish customers [a] list of retailers," but we do not think that a reasonable finder of fact, considering this statement in light of all of the evidence, could conclude that by this statement Western Union had committed itself on pain of legal sanction to keep on furnishing the vendor list to its customers indefinitely if Olympia "accepted" the "offer" by selling terminal equipment to Western Union's subscribers. Promotional materials that Olympia gave prospective investors disclaimed any commitment by Western Union to conform to a rule or policy of encouraging new entry into the terminal equipment market. Instead these materials warned prospective investors that if Western Union's policy changed they could lose their investment. A similar warning might have been necessary even if Olympia had thought it had a contractual commitment. But there is a difference between saying that one thinks one has contractual protection but can't be sure and anyway a suit for breach of contract is a protracted and expensive undertaking, and representing—as Olympia represented to prospective investors—that one is entirely at the mercy of another firm's unknown and unpredictable future marketing decisions.

We do not want to put all of our weight on statements made to prospective investors in Olympia; prudent firms will bend over backwards to avoid painting too rosy a picture of the enterprise's prospects and so inviting a suit for fraud if the enterprise falters, as it did here. The more important point is that Olympia was a sophisticated outfit that knew the difference between "a legally binding promise" and "a hopeful encouragement, sounding only in prophecy." *Hall v. First Nat'l Bank*, 173 Mass. 16, 19, 53 N.E. 154, 155 (1899) (Holmes, C.J.). See also *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 29-30 (9th Cir. 1971). Olympia could have negotiated for contractual protection but did not, doubtless realizing that Western Union would not commit itself to protecting Olympia's market. If it is inconceivable that Western Union would have signed an express contract, it is unreasonable to infer an implied contract.

"An offer, to constitute a contract, must be one which is intended of itself to create legal relations on acceptance. The agreement must purport to produce a legally binding result, or, to put it in another form, the intention of the parties must refer to legal relations. It must contemplate the assumption of legal rights and duties. An offer is a statement by the offeror of what he will give in return for some promise or act of the offeree. As the offeror's statement necessarily looks to the future, it must always be promissory in terms. An expression of desire or hope is not of itself an offer which will become a contract upon acceptance by the adversary party." *Broad Street Nat'l Bank v. Collier*, 112 N.J.L. 41, 43-44, 169 Atl. 552, 553 (Sup. Ct. 1933), aff'd, 113 N.J.L. 303, 174 Atl. 900 (N.J. 1934) (per curiam) (citations omitted). See also *Trustees of First Presbyterian Church v. Howard Co. Jewelers*, 12 N.J. 410, 413-14, 97 A.2d 144, 146 (1953). The quoted words could have been written with this case in mind. Western Union used no promissory language; on the significance of this omission see Farnsworth, Contracts § 3.3 at p. 108 (1982). It did not even say, "If you providers

enter the market, we will put you on a vendors' list that our salesmen will show new subscribers to telex service." It gave no indication that it intended to be legally bound should its hope that firms like Olympia would enter the terminal equipment market be realized. The case resembles an example given in the first Restatement of Contracts § 25, illustration 4 (1932), of a statement that is *not* an offer: "A writes to B, 'I am eager to sell my house. I wish to get $20,000 for it.' "

An additional consideration is the lack of specificity of Western Union's "offer." See *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 163 N.J. Super. 463, 474-75, 395 A.2d 222, 228 (1978); Simpson, Handbook of the Law of Contracts 16 (2d ed. 1965). No terms are stated. As interpreted by Olympia, Western Union was committing itself to assist new entrants in the terminal equipment market indefinitely and regardless of changes in competitive conditions or even customer acceptance of the entrants' service. This is hardly plausible; and a court asked to enforce the "contract" between the parties would have no guidance in filling in realistic terms. This is not a case of an existing contractual relationship, where the court is merely asked to fill in and enforce an omitted but reasonably implied term. See *Bak-A-Lum Corp. v. Aloca Bldg. Products, Inc.*, 69 N.J. 123, 351 A.2d 349 (1976). The relationship created by Western Union's invitations to the vendors was so nebulous that it would be impossible for a court to imply the conditions or duration of the "offer." If Olympia wanted the security of a contract, it should have negotiated one, not ask a court to write one for it after the fact.

Olympia does not argue that it can recover damages on a noncontractual common law theory such as equitable estoppel, even though misrepresentations that it accuses Western Union of having made are relevant if at all only to equitable estoppel, and not to whether there was an offer. Nor does Olympia argue promissory estoppel, though as we noted recently the requirements for proving a prom-

ise on which a case of promissory estoppel can be based are less stringent than those for proving an offer. *Goldstick v. ICM Realty*, 785 F.2d 456, 461-63 (7th Cir. 1986).

Although Olympia failed to make a case on which a reasonable finder of fact could have based a finding of either a section 2 violation or a breach of contract, for completeness we shall indicate briefly why, even if it had, the judgment could not be upheld. Olympia asked the jury to award damages of $54 million. This astonishing figure for an enterprise that was organized as a tax shelter, and when organized projected total profits over 10 years of only $1.4 million, was arrived at by assuming the following: had it not been for Western Union's allegedly unlawful conduct, Olympia would have bought from Teletype Corporation and leased to Western Union's telex subscribers 10,000 more terminals in the three years following its glorious burst of business in 1975 than it actually leased; these leases would have yielded over a further period of years income similar to that generated by the 1,800 leases that were installed; the equipment would then have been retired. The $54 million is the projected lease income on the entire 11,800 terminals, discounted to present value and net of the cost of buying and leasing the terminals. Since a terminal costs only $2,400, and since Olympia had as far as the record shows no substantial assets other than terminals, the projected net profit (discounted to present value) of $4,576 per terminal ($54 million divided by 11,800) translates into a rate of return on investment of 191 percent—this for a brand-new company that had virtually no assets, that depended on Teletype Corporation to sell it terminals and on Western Union to refer customers to it, and that never expected to lease more than 3,200 terminals.

The projection of lost profits that Olympia's expert witness made to the jury bore no relation to Olympia's internal business planning or to economic reality. Compare *In re Innovative Construction Systems, Inc.*, No. 85-1142, slip op. at 25-26 (7th Cir. June 17, 1986). It is thus one more illustration of the old problem of expert witnesses who are "often the mere paid advocates or partisans of

those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.' " *Keegan v. Minneapolis & St. Louis R.R.*, 76 Minn. 90, 95, 78 N.W. 965, 966 (1899). See *Albers v. Church of Nazarene*, 698 F.2d 852, 858 (7th Cir. 1983); *Deltak, Inc. v. Advanced Systems, Inc.*, 574 F. Supp. 400, 405 (N.D. Ill. 1983), vacated on other grounds, 767 F.2d 357 (7th Cir. 1985); L. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 53 (1901). The expert in this case dazzled the jury with "an array of figures conveying a delusive impression of exactness," *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir. 1962) (Friendly, J.); see *Taylor v. Meirick*, 712 F.2d 1112, 1119-22 (7th Cir. 1983)—delusive because the figures had no relation to reality. If Olympia could earn a 191 percent return on investment simply by acting as a jobber of Teletype Corporation equipment to customers referred to it by Western Union, Western Union could earn a similar return by buying the same equipment from Teletype Corporation and leasing it to its telex customers directly; other vendors could do the same; and Teletype could cut out the middleman and sell its equipment to Western Union's subscribers directly and make a bundle doing so. A rate of return so far in excess of market rates of return would be a magnet drawing productive resources into the market—and confronting Olympia with competition from far more experienced firms.

Olympia argues that leasing telex equipment was a risky business because telex service had an uncertain future; and if subscribers cancelled the service and with it the equipment leases Olympia's profits would be much smaller than projected. In fact telex service has proved surprisingly durable but because (Olympia argues) this was not foreseen it would not have drawn other firms into the market. As Olympia's own evidence shows, however, many firms were active in this market in the late 1970s and competition among them would have knocked down the extravagant rates of return that its expert witness forecast.

The jury awarded the full $54 million asked for by Olympia, irrationally parcelling it out between the antitrust violations ($24 million) and the contract violation ($30 million). The district judge ordered a remittitur (which Olympia accepted) of everything over $12 million but gave no reasons for picking this figure. Just because $54 million is too much, it does not follow that $12 million is not too much. It still represents a huge rate of return on Olympia's projected investment—42 percent, contrary to all the probabilities. The record contains no basis for a rational estimation of Olympia's damages.

Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer. See, e.g., *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-66 (1931). But when a small, inexperienced firm created largely to exploit opportunities to save taxes extrapolates a multi-million dollar future from a few months of success, courts must be on guard against the more than possibility that the extrapolation ignores economic reality. Huge profits invite competition, to which Olympia was highly vulnerable, as its rapid exit from the market after only a few months of adversity demonstrates. There are no grounds for thinking it could have survived in this highly competitive market for 10 years while earning a 191 percent, or even a 42 percent, rate of return on its investment.

In any event there was no rational basis for the verdict on liability. The judgment of the district court is reversed with directions to enter judgment for Western Union.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-3150

OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY, and PAULA JEANNE FELDMAN, personal representative of the estate of Abraham Feldman,

Plaintiffs-Appellees,

v.

WESTERN UNION TELEGRAPH COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 77 C 4556—**Charles P. Kocoras,** *Judge.*

On Petition for Rehearing
October 6, 1986

Before BAUER, *Chief Judge,* and POSNER and FLAUM, *Circuit Judges.*

PER CURIAM. Olympia has petitioned for rehearing (with the suggestion that it be en banc) of our decision of July 18, 1986, ordering that the complaint be dismissed. 797 F.2d 370. Since all the members of the original panel have voted against rehearing, and no judge in regular active service on this court has voted for rehearing en banc, the petition is DENIED.

We have thought it appropriate to make a brief statement, however, in response to the principal ground urged for rehearing this matter, which is that the panel "avoided and counter-attacked," rather than following, the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985). The other points raised in the petition for rehearing are either ancillary to this one or rest on errors of fact and misstatements concerning the panel's opinion, and, as pointed out in Western Union's answer to the petition, on assertions inconsistent with representations made by Olympia at the argument of the appeal.

The petition characterizes as willful the panel's refusal to accept Olympia's argument that the outcome of this case is dictated by *Aspen*. The petition suggests that the panel considered *Aspen* "trumped" by a 10-year-old book written by a member of the panel—a book not cited or mentioned by the parties, or in the panel's unanimous opinion. The petition both characterizes the opinion as a "frontal assault" on *Aspen* and suggests that it is a sneaky end run effected by making findings of fact at the appellate level.

Barely visible behind the clouds of invective is a serious and debatable argument concerning the scope of *Aspen*, to which the panel devoted extended consideration. See 797 F.2d at 377-79. Although recognizing the possibility that reasonable persons might differ on the proper interpretation of *Aspen* in the circumstances of the present case, we adhere to our conclusion that *Aspen* is distinguishable and that in this case no rational finder of fact could find exclusionary conduct.

The uncontested facts show that Western Union, as a means of making its exit from the market for telex terminal equipment, provided its salesmen with a list of independent vendors of such equipment, including Olympia, but that later, deciding that liquidation of its own equipment inventory was proceeding too slowly, withdrew the list, thereby compelling Olympia to recruit its own sales

force, which it was unable to do. We held that on these facts no violation of section 2 of the Sherman Act could be found.

Aspen, as we pointed out, is generically similar to this case in that it too is a case about the severing of a cooperative relationship between a firm with monopoly power and a competing firm. But there the resemblance ends. Aspen Skiing owned three of the four mountains in the Aspen ski complex, and Aspen Highlands the other one. Each company offered their customers a joint ticket—i.e., one usable on all four mountains—because the customers wanted the variety. The litigation was precipitated by Aspen Skiing's decision to stop offering the joint ticket. Skiers would now have a choice between buying one ticket from Aspen Skiing, giving them access to three mountains, or, if they also wanted the fourth, buying two tickets.

The differences between *Aspen* and the present case are numerous. First, the joint ticket (a) was used in other multi-mountain ski complexes and (b) had originated in Aspen at a time when the various mountains had been under separate ownership and competed with each other. The vendor list in this case, which in effect made Western Union's sales force the sales force for competing suppliers of telex terminal equipment as well, was not shown to be common in the industry or the kind of convenience that customers will demand and be supplied in a competitive market. Indeed, it was a device by which Western Union was trying to ease its way out of this market. Second, and related, competition had forced Aspen Skiing to enter into a cooperative relationship with Aspen Highlands. The Court held that the acquisition of monopoly power did not authorize Aspen Skiing to terminate the relationship, to the disadvantage of consumers as well as of Aspen Highlands. But competition did not force Western Union to provide a vendor list to its customers; it took this step because it wanted "out" of this market, and rescinded it not because its monopoly power had grown but because it wasn't getting out fast enough! Third, Aspen Highlands could not "fight back" by acquiring two more ski moun-

tains in Aspen so that it, too, would be able to offer a three-mountain ticket; there are no other ski mountains in Aspen, and no possibility of creating some. But other vendors of telex terminal equipment could and did hire their own salesmen. Fourth, in the unusual factual setting of the *Aspen* case the cancellation of the joint ticket appeared to be a gratuitous effort to obtain a competitive advantage, even at some cost in customer good will. In this case, there is no evidence that consumers noticed or cared about the withdrawal of the vendor list, and Western Union, far from trying to expand its market share, was, so far as appears, trying to get out of the market completely; it just wanted to be sure that when it left it wouldn't have a big equipment inventory that might have to be sold for scrap.

Obviously it would be absurd to say that because the facts of *Aspen* are not identical to those of this case, we can ignore *Aspen*. We neither said nor meant any such thing. The relevant factual differences are not the differences between snow and teletype or between a mountain and a piece of paper; they are differences in competitive history and circumstances, conditions of entry, etc., which enabled a rational jury to infer that Aspen Skiing was engaged in anticompetitive conduct, but would not enable a rational jury to infer that Western Union was so engaged. On the facts summarized above and in the panel opinion, facts which are either undisputed or indisputable on the record, we do not see how section 2 of the Sherman Act could be construed to supply Olympia with a claim for relief, unless there is a general principle of antitrust law that a competitor is entitled to the assistance, in selling its product, of any firm in its market that happens to have monopoly power. A monopolist is not required to subsidize its competitors by doing their selling for them—Olympia's essential claim. We do not read *Aspen* to establish such an entitlement under antitrust law. Certainly nothing in the Supreme Court's opinion purports to effect so drastic an expansion in the accepted scope

of liability under section 2, and in declining to infer such a principle through a process of reading between the lines we are not guilty of defying our judicial superiors.

FLAUM, *Circuit Judge*, with whom BAUER, *Chief Judge*, joins. It is with regret and reluctance that I write on this matter on behalf of myself and Chief Judge Bauer. The inappropriate tone of the petition for rehearing submitted in this appeal, however, compels this brief comment.

We accept the proposition that this court, in any given opinion, can misapprehend the facts, or mistakenly apply the law, or even overlook important facts or controlling law. But to state as does the petition for rehearing in this case that a judge of this court has seized an opportunity to preempt a ruling of the United States Supreme Court and emasculate its principles while purporting to give the case careful and respectful consideration is simply, in our view, beyond the bounds of acceptable aggressive appellate advocacy.

Moreover, to charge that the panel opinion engages in rampant *de novo* factfinding, ignores or misstates uncontested facts, and treats other factual issues as questions of law to be redecided on appeal constitutes neither respectful nor responsible pleading. In addition, to conclude, at least by implication, that the above described approach is undertaken to advance the individual legal/economic views of the authoring judge is an inappropriate commentary on the perceived thrust of the panel opinion issued in this case as well as the role of the other panel members.

This case represents significant litigation with difficult issues. Substantial, indeed spirited, disagreement can reasonably exist over the treatment of the legal questions in this matter and how they are to be addressed. In fact, despite the deficiencies in the civility of the petition, these arguments are to be found. What is not to be found is justification for counsel of the professional stature and ac-

complishment of the attorneys for the appellees to be signatories to a brief of such a disrespectful nature.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 77 C 4556

OLYMPIA EQUIPMENT LEASING COMPANY,
an Illinois Limited Partnership, et al.,

Plaintiffs,

vs.

WESTERN UNION CORPORATION,
a Delaware Corporation,

Defendant.

Chicago, Illinois
November 1, 1985
11:00 o'clock a.m.

* Numbers in brackets refer to the court reporter's original pagination of the Transcript of Proceedings.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES P. KOCORAS

APPEARANCES:

For the Plaintiffs:

MESSRS. SPERLING, SLATER & SPITZ
BY: MR. BRUCE SPERLING,
MR. PAUL SLATER and
MR. STEPHEN SPITZ
55 W. Monroe, Suite 3300
Chicago, Illinois 60603

For the Defendant:

MESSRS. WINSTON & STRAWN
BY: MR. EDWARD FOOTE,
MR. MARK MCCAREINS and
MR. ROBERT FOSTER
One First National Plaza
Suite 5000
Chicago, Illinois 60603

Court Reporter:

MS. JOENE HANHARDT
Official Court Reporter
219 S. Dearborn Street, Suite 2102
Chicago, Illinois 60604

[2] THE CLERK: 77 C 4556, Olympia Equipment vs. Western Union. Ruling.

THE COURT: Good morning.

MR. SPITZ: Good morning, your Honor.

MR. SPERLING: Good morning, your Honor.

MR. FOOTE: Good morning, your Honor.

THE COURT: I assume everybody is here. I cannot imagine anybody is missing.

Okay. Let me then get right to the business at hand.

I have reviewed the extensive briefs that have been filed in this case, the evidence in this case and the law. The legal standard for motions for a directed verdict or a judgment not withstanding the verdict is as follows:

It is the duty of the Court to consider the evidence in the light most favorable to the plaintiff, including all reasonable inferences to be drawn from the evidence.

In accordance with that standard, I believe the following conclusions, among others, can be drawn with respect to the evidence that was received in this case.

First, I believe there was evidence sufficient to support the finding of a reasonable jury that:

Western Union possessed a monopoly for Telex/TWX access line service;

That Western Union possessed monopoly power in the terminal market for Telex/TWX access line service users;

[3] That the Telex/TWX access line service was a separate and distinct market and that terminals for use in the Telex/TWX communications service were submarkets of or adjacent markets to the Telex/TWX access line market;

That it was necessary for vendors competing with Western Union for the sale or lease of terminal equipment to new Telex/TWX access line customers to rely on Western Union for the dissemination of information as to the existence of the vendors;

That Western Union induced, through various statements and representations, outside vendors of terminal equipment to come into the Telex/TWX terminal equipment market, and that these included the promise that the vendors' option would be impartially presented;

That vendors, including Dal-Data, relied on representations and statements made by top level Western Union employees to enter into the Telex/TWX terminal equipment market, a market that was not open to competition before 1973;

That Western Union did intend to withdraw or lessen its presence in the terminal market and took steps toward the accomplishment of that objective, including the aforementioned inducement of outside vendors to enter the terminal market. The effort was styled as the Customer Provided Terminal program and envisioned, among other things, the sort of efforts that were, in fact, made by outside vendors;

[4] That notwithstanding Western Union's genuine desire to withdraw from the terminal market, it still possessed monopoly power in that market during the summer and fall of 1975, the period most critical and relevant in the relationship of the parties to this lawsuit.

The evidence supports the conclusion—indeed, compels it—that during this particular period of time, Western Union's own inventory of Telex/TWX terminal equipment was increasing, rendering unproductive the investment made in those goods. At least one of the reasons for the inventory build-up was the effect that outside vendors were having on the new access line business, an effect which was detrimental to Western Union's efforts to sell and lease its then existing and substantial inventory.

As a result of these conditions, and perhaps because of collateral considerations as well, at least with respect to Mr. Feldman, Western Union's policy and practices with respect to the CPT program were significantly altered. That alteration inured to the benefit of Western Union and to the detriment of the vendors, including Mr. Feldman.

While it would not have violated anti-trust laws if Western Union had decided to implement those alterations openly and fairly, with an opportunity to the vendors to competitively deal with the changed circumstances, a reasonable jury could have found from this evidence—as this jury did, in fact, [5] find—that Western Union did not do

so, but rather used its pre-eminent position in the Telex/TWX access line market and the adjunct terminal market to inhibit or foreclose competition from the outside vendors.

The evidence affords a basis for the conclusion that Western Union used its monopoly power in an anti-competitive or exclusionary way, and not in a manner in which an unfettered marketplace would dictate success or failure; that is, based on quality and price of goods and services.

Although it is true that Western Union was essentially responsible for Mr. Feldman's marketing success—in many instances he was simply filling orders for customers Western Union gave to him, and one might say that he was "made" by them—it is also true that he contributed his and his company's resources, both capital and labor, toward reaching the objective of the CPT program. But more significantly, and even on the assumption that it was Western Union who made him, Mr. Feldman was entitled to the protection of the federal anti-trust laws. Western Union had neither the legal right nor the legal entitlement to "break" him. A famous jurist, in another context, said that the hand once put to the task cannot thereafter be removed with impunity. That same principle applies in this case.

In many ways, this case is indeed, as the plaintiffs contend, remarkably similar to Aspen Highlands Skiing Corp. vs. [6] Aspen Skiing Company, a case decided this year by the Supreme Court. While it may be true that Western Union did not have any legal obligation to establish the relationship it did with Dal-Data by virtue of the CPT program, these competitors became engaged in a cooperative marketing program. Once that was established, Western Union was not free to use its dominant position in the marketplace to impair the opportunities of its rivals in a way that impeded competition on the merits.

It is my view, therefore, that the evidence permits a reasonable fact-finder to conclude that Western Union violated the anti-trust laws in the manner in which the jury was instructed in this case. It is also my view that the jury was correctly, completely and fairly instructed as to the applicable law of anti-trust.

Consequently, challenges to the jury's verdict as to liability by Western Union for Sherman Act violations, either as to the sufficiency of the evidence to support the verdict or the legal principles upon which that verdict was grounded, are rejected as unmeritorious. Because I have previously addressed, either in pretrial or trial rulings, many of the matters raised in the post-trial motion, I will not revisit each of the contentions made in that motion by Western Union. It is sufficient to note that I do not intend to rest my decision as to anti-trust liability solely on those matters commented upon me now, but rather on the entirety of the [7] record, including prior rulings and reasons therefore.

In addition to the above, I have also reviewed and rereviewed the arguments made with respect to the standing question involving Alfco and Dal-Data. I believe the evidence supports the notion that Alfco, Olympia and Dal-Data operated as one economic enterprise which was in competition with Western Union, although I also believe that the entities other than Dal-Data were established principally for tax reasons and the relationships structured with the same consideration in mind. Had all of those entities continued in business, the necessity to insure against potential arbitrary and artificial income and expense shifting may have been present for both anti-trust and tax purposes; but notwithstanding that possibility, I believe the jury was correctly instructed on the issue of standing and proximate cause, and I will not reverse my prior rulings on that subject.

I now turn to the matter of damages, an area of this case far more difficult to resolve than the question of whether the evidence supported the jury's verdict that there was an anti-trust violation here. It is helpful to address the applicable law on this point and it is appropriate to look at the Seventh Circuit's decision in MCI Communications vs. American Telephone and Telegraph Company, reported at 708 F. 2d 1081, a 1983 case, where all of the controlling legal principles are set forth. Some of those are as follows:

> [8] "If a plaintiff has suffered financial loss from the lawful activities of a competitor, then no damages may be recovered under the anti-trust laws. It is a requirement that an anti-trust plaintiff must prove that his damages were caused by the unlawful acts of the defendant.
>
> "Once causation of damages has been established, the amount of damages may be determined by a just and reasonable estimate, so long as the jury verdict is not the product of speculation and guesswork.
>
> "Since the Supreme Court has been willing to accept a degree of uncertainty in the calculation of damages, strict proof of what damages have been caused by which acts has not been required.
>
> "Not requiring strict disaggregation of damages among the various unlawful acts of the defendant serves to prevent a defendant from profiting from his own wrongdoing and makes sense when damages arise from a series of unlawful acts intertwined with one another.
>
> "The courts have always distinguished between proof of causation of damages and proof of the amount of damages. Thus, the courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the illegal practices of the defendant.

"When a plaintiff improperly attributes all losses to [9] a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of 'speculation or guesswork' not permitted for anti-trust jury verdicts. To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

"There is nothing inconsistent between requiring proof that damages were caused by illegal acts and the rule that a plaintiff need not disaggregate damages among those acts found to be unlawful."

Although, of course, there are a number of other antitrust cases, I think fairly said those principles—the principles of those other cases on the matter of damages—have all been covered in the MCI case and are essentially what I just read to you.

It is not surprising to find the parties at loggerheads over what the evidence showed as to damages, particularly as to whether Mr. Brandzel's damage model attributed some of the plaintiff's losses to defendant's lawful acts or whether it fairly presented reasonable estimates of losses based solely on defendant's unlawful conduct. I believe it is appropriate to recognize the built-in hazards in attempting to project certain conditions years into the future. [10] The world is full of examples which are testament to the frailty of man in so doing. Particularly in this suspect when a damage model for the future suggests a $54 million success, when the essential historical data upon which these projections are based reflect that the plaintiffs here, individually and collectively, had a history of losses rather than demonstrated and measurable success.

It is also worthy to note at this point Judge Easterbrook's comments about another valuation based on a dis-

counted cash flow in the case of Metlyn Realty Corporation, et al. vs. Esmark, Inc., an opinion which issued on May 16, 1985. At Page 17 of the slip opinion, Judge Easterbrook said of those studies:

> "Such valuations are highly sensitive to assumptions about the firm's costs and rate of growth, and about the discount rate. It is a simple matter to increase or reduce the outcome of a cash flow analysis by 200 percent by making changes in assumptions that appear by themselves to be insignificant."

The defendant here has also challenged one of the basic assumptions in the damage model—that model is the principal evidentiary support for the amount of damages awarded—and that is that Mr. Feldman and his entities would have a 20 percent share of the market during the entirety of the projected period. The 20 percent assumption is based on a [11] period of a few months when Dal-Data was enjoying its greatest success.

Western Union argues that this 20 percent market share was experienced during a period of time when Western Union was paying its own salesmen a commission for placing vendors' terminals, a commission it was not obligated to pay and one which was changed as of September 1, 1975. Since it was undisputed that Western Union had the legal right to either curtail or terminate the practice of paying its own salesmen any commissions on placements of vendors' terminals, and since it is also equally clear that the change in commissions was a material factor and would have a detrimental effect on vendor placements, Western Union argues that this was a lawful act which had to be recognized in any reasonable measure of damages. Western Union says that it was necessary to disaggregate damages among those found to be unlawful. The plaintiffs argue that the 20 percent market share is what the plaintiffs could have lawfully obtained in any instance.

In addition to the above, Western Union attacks the damage model by, among other things, contending that inadequate account is taken of the fact that competition in the terminal field was increasing during the model years and that the number of competitors increased dramatically, and that technological advancements were also a significant consideration to be dealt with. The plaintiffs' response to these and other challenges [12] is, among other things, that the contentions go to the weight of the evidence and this is a determination properly left to the jury.

I will not attempt to address all of the other arguments on the subject. I would simply point out that many times the difference between admissibility of evidence and the weight to afford it is only a matter of degree.

I have presided over this case over much, but not all, of its existence. The lawyers and parties have appeared before me in a number of court appearances, pretrial conferences, a non-binding summary jury trial and, finally, a trial of considerable length. The case was more than ably tried. It was some of the best civil advocacy I have experienced as a judge. The evidence was fully and exhaustively presented and skillfully argued.

After listening carefully to all of that evidence, I have two firm convictions in this case. The first is that Mr. Feldman and his entities were the victims of an anti-trust violation by Western Union and that this conclusion is overwhelmingly supported by the evidence. The second firm conviction I have is that the jury verdict of $24 million as anti-trust violation damages and $30 million contract damages is excessive and, if allowed to stand, would result in a miscarriage of justice. The trebling feature of Sherman Act awards provides an adequate remedy to a wronged plaintiff for [13] the punitive conduct he was faced to endure. Mr. Feldman was clearly wronged here and he is entitled to be compensated for that wrong.

I believe, based on the evidence, a just result in this case is to award the plaintiffs $12 million for the Sherman Act violation which, when trebled, will result in an award of $36 million in total. Because I believe the jury's contract damages was subsumed by the anti-trust damages—and I believe everybody accepted that premise prior to the return of the jury's verdict—and because I do not believe that contract award is supported by the evidence, I will not have judgment entered on the contract verdict.

Accordingly, I am going to order a remittitur of $12 million from the jury verdict of $24 million prior to trebling. When trebled, therefore, the damages to be awarded in this case will be $36 million; and if the remittitur is accepted, judgment will be entered in that amount. If the remittitur is not accepted, I am going to grant the defendant's motion for a new trial. If a retrial is necessitated in this case, that retrial will be limited to a determination of the proper amount of damages to be awarded. The evidence supports the jury verdict as to the fact of defendant's liability and, notwithstanding plaintiffs' acceptance or rejection of the remittitur, judgment will be entered in favor of the plaintiffs as to liability. I will allow the plaintiffs a reasonable [14] period of time within which to advise the Court of their decision.

I will ask you at this time how much time you would like for that decision.

MR. SPERLING: Could we take a few minutes to address that subject among ourselves—just two or three minutes among outselves?

THE COURT: Sure.

(Brief pause.)

MR. SPITZ: Stephen Spitz, your Honor, for the plaintiffs.

THE COURT: I would recognize you anywhere, Mr. Spitz.

MR. SPITZ: Your Honor, we would like a week to consider the Court's order.

THE COURT: Okay.

MR. SPITZ: We would also respectfully suggest that the judgment should be entered in the alternative, in the event that the Seventh Circuit would disagree with the Court's view of the anti-trust liability, so then we would have a judgment on the contract claim that we would be entitled to enforce. We understand and agree that that judgment is in the alternative.

THE COURT: All right. I will consider that. I saw that in your argument, and perhaps that is the appropriate way to deal with that.

[15] MR. SPITZ: Thank you, your Honor.

THE COURT: That would, of course, be for the $12 million that I have ordered.

MR. SPITZ: I understand.

THE COURT: That has no trebling feature. So, I will accept that correction, even at this point. We will enter it in the alternative.

MR. SPITZ: Thank you very much, your Honor.

THE COURT: Mr. Foote?

MR. FOOTE: I am just here, your Honor, because I figured Mr. Spitz would say something that I would have to object to, but he did not.

MR. SPITZ: I finally didn't.

THE COURT: Well, I think what he said makes sense, and rather than not enter judgment, we will enter judgment in the alternative on the contract claim should the Court of Appeals see fit to trifle with one of the causes of action, but not the other—although I am confident that they will not trifle with my ruling. But I have been wrong before.

MR. FOOTE: So, there is no final judgment entered today, then. They want a week—

THE COURT: Well, I am going to enter judgment as to liability, but there is no amount. If the remittitur is accepted,

then the judgment will be entered as to the amount, and I think certainly it would be—well, I will have to [16] figure out when it would be effective.

MR. FOOTE: Yes, for purposes of appeal and other matters.

Your Honor, we will be back again in a week; is that what your Honor wants?

THE COURT: A week. So, for purposes of appeal, it is not a final judgment today. All right? We will wait for a week for that, because I do not want any clock problems on the matters of appeal. Okay?

MR. SPITZ: Judge, if we would decide not to accept the remittitur, would you certify the new trial order—or have you thought about that?

THE COURT: No. I would not mind doing that, and I have researched the question and the cases suggest that I cannot do that—that it is a matter that cannot now go upstairs—but it has to be retried on whatever the new trial is.

You can educate me about that. I do not think anybody wants to try this case three times, let alone two times, but my review of the case law is that this is not the kind of issue that the Court of Appeals would receive on a certification. There is not anything novel on the matter of law or controlling precedent of law here. What we have is an application of facts to the law.

But if you want to further educate me, I may be wrong [17] about that.

MR. SPERLING: Your Honor, in the event that the law would permit us to do that, would the Court be inclined to allow us to do that?

THE COURT: I think I would be, yes.

MR. SPITZ: I think we just have to look at the cases. There are some cases where certifications like that have

occurred and it just would be a question whether it is applicable to this circumstance.

THE COURT: Okay. I think this Circuit generally does not accept interlocutory appeals of that nature, and that is what this would be.

MR. SPITZ: I understand.

THE COURT: But if you could persuade me that the law is such that it would allow it, I would certainly consider it, because I have considered that question myself.

MR. SPERLING: Okay. Thank you.

MR. SPITZ: Thank you very much, Judge.

MR. FOOTE: Thank you.

* * * * *

[Certification of Official Court Reporter omitted in printing.]

APPENDIX D

JUDGEMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois

July 18, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge.*

OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY, and PAULA JEANNE FELDMAN, personal representative of the estate of Abraham Feldman,

Plaintiffs-Appellees,

No. 85-3150 vs.

WESTERN UNION TELEGRAPH COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 77-C-4556—**Charles P. Kocoras**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with directions, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX E

PERTINENT STATUTES INVOLVED

Section 2 Of The Sherman Act, 15 U.S.C. §2 (1980)

§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on the conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 Of The Clayton Act, 15 U.S.C. §15 (1914)

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX F

LEADING CASES

Seventh Circuit Construes *Aspen Highlands*, Holding Monopolist Has No Obligation To Assist Competitors

Section 1 Claim Of Unlawful Vertical Agreements Between Seller And Its Supplier Will Not Support Exclusive Dealing Claim Absent Supporting Evidence, Ninth Circuit Rules

SPECIAL REPORT

Noerr-Pennington Immunity

AT THE JUSTICE DEPARTMENT

Is Douglas Ginsburg Leaving?

This Antitrust Report prepared by
Julian O. von Kalinowski
Of The California And Virginia Bars

Contributing Editor
Peter Sullivan
Of The California And New York Bars

Assisted By
Andrew B. Steinburg, Esq.

Leading Cases

SEVENTH CIRCUIT CONSTRUES *ASPEN HIGHLANDS* AND HOLDS THAT A MONOPOLIST HAS NO OBLIGATION TO ASSIST COMPETITORS

The Seventh Circuit considered what obligations were placed on a monopolist in terms of assisting its competitors. In so doing it construed the Supreme Court's decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., ____ U.S. ____, 105 S. Ct. 2847 (1985), narrowly. The circuit court held that a monopolist generally has no duty to give assistance to its competitors. A monopolist will violate the antitrust laws only if it refuses to cooperate with a competitor in circumstances where competition requires cooperation. Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 1986-1 Trade Cas. ¶ 67,189 (7th Cir. 1986).

Background

Defendant, Western Union, created "Telex", which transmitted messages over communications lines owned or leased by Western Union. Until the 1970's, Western Union not only sold its customers telex services but required its subscribers to lease terminals from it. The price of the telex service was "bundled"—that is, it covered telex service as well as lease of the terminal.

In 1971, Western Union acquired a competitive "telextype" service, "TWX". In order to acquire TWX, Western Union unbundled its service price. In 1973 Western Union opened the telex terminal market to competition. It not only unbundled its pricing service and equipment

but told subscribers they were free to purchase terminal equipment from competitors. Western Union planned to withdraw from the telex terminal market after it sold its last terminal to a lessee.

Plaintiff, Olympia, was formed in 1975 to take advantage of the new competition for the sale of telex terminals. In order to obtain customers, Olympia relied on referrals from Western Union salesmen. Western Union, for a period of months, encouraged its salesmen to push terminals offered by competitors. Subsequently, Western Union instructed its salesmen to stop showing subscribers lists of competing vendors when it found that it was liquidating its own terminals too slowly. This had the result of increasing sales of Western Union terminals while decreasing the sales obtained by its competitors. This created havoc in the market. Vendors who had their own sales forces were able to continue selling. However, Olympia went out of business in 1976 after it attempted to create a sales force of its own. Prior to leaving the market, Olympia told Western Union subscribers to cancel their leases. This enraged Western Union. One internal Western Union memorandum stated that "these turkeys . . . ought to be flushed." (*Id.* at 63, 126.)

After being forced out of business, Olympia sued Western Union under Section 2 of the Sherman Act. It alleged that Western Union was guilty of monopolization or an attempt to monopolize.

The case was tried to a jury which awarded $54 million. This sum was made up of $24 million for alleged antitrust violations and $30 million for contract violations. After remittitur, the amount was reduced to $12 million for antitrust damages or alternatively $12 million for breach of contract. The antitrust damages were trebled to $36 million, plus reasonable attorneys' fees.

The district court judge refused to grant Western Union's motion for judgment notwithstanding the verdict. Western Union appealed.

Seventh Circuit Opinion

The Seventh Circuit, in an opinion written by Judge Posner, reversed. It found that Western Union had no monopoly in the terminal market. At most, Western Union had monopoly power only over telex service, which it might use to curtail competition in the market for terminal equipment.

Judge Posner disagreed with the jury's conclusion that Western Union had market power. He believed there were substitutes for the telex-type service, precluding market power. Despite this, the Seventh Circuit let the jury's finding on market power stand.

The circuit court did, however, refuse to find any abuse of Western Union's market power. The Seventh Circuit recognized that a monopolist can compete hard against its competitors without being found guilty of violating Section 2 of the Sherman Act. Abuse of monopoly power, not the mere possession of it, violates Section 2.

The only abuse of market power which was alleged was that Western Union stopped helping competitors after it created and nurtured this competition through having Olympia's products sold through referrals by Western Union's salesmen. Western Union stopped this aid to its competitors when it found it wanted to liquidate its inventory faster. According to the Seventh Circuit, this did not constitute abuse of market power.

The Seventh Circuit based its conclusion on the fact that it made no sense to find that ceasing to help a competitor

could constitute an antitrust violation when the monopolist had no duty to help that competitor in the first place. In reaching this conclusion, the Seventh Circuit recognized that the offense of monopolization had evolved over the years. It is now apparent that a monopolist is free to compete with everybody and is restrained in its competition only when it abuses its monopoly power.

It is not an abuse of monopoly power to reduce prices to help consumers or to refuse to extend a helping hand to a new entrant. A monopolist has no duty to disclose its business plans to rivals in order to help them compete against it. Moreover, if a monopolist does help a competitor, it can withdraw that help at some subsequent time without incurring antitrust liability.

The Seventh Circuit considered the essential facilities doctrine and the *Aspen Highlands* case. After surveying the law, the Seventh Circuit stated that under the cases which established the essential facility doctrine, a duty to provide access to the essential facility is imposed upon a monopolist only if the competitor is also a customer of the monopolist and the monopolist restricts access to the facility in order to discourage competition with it. Since this did not occur in the instant case, that doctrine did not mandate a different conclusion.

Next, the Seventh Circuit narrowly construed the Supreme Court's opinion in *Aspen Highlands*. It held that the instant case was not analogous at all. The Seventh Circuit refused to state that, in its opinion, *Aspen Highlands* stands for the proposition that a monopolist's refusal to cooperate with a competitor violates the antitrust law if the monopolist cannot give a good business justification for its refusal. Lack of business justification may only indicate probable anticompetitive effect of the challenged activity.

In any event, there was a clear business justification in the present case—Western Union wanted to liquidate its supply of telex terminals as fast as possible. In *Aspen Highlands*, the defendant discontinued service that its customers valued in hopes of reaping a long-term, anticompetitive gain. Western Union, on the other hand, did nothing to obstruct competitors other than discontinue referrals. Olympia was completely free to compete. The lack of referrals did not affect other competitors. Nothing prevented Olympia or others from acquainting customers with their goods. These factors distinguished the case from *Aspen Highlands*, where plaintiff could not acquire the three mountains it needed to compete.

At best, the Seventh Circuit found that *Aspen Highlands* must be narrowly construed. "If it stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." (*Id.* at 63, 131).

Finally, the Seventh Circuit recognized that otherwise lawful conduct is not made anticompetitive merely by the fact that it is motivated by hostility to competitors. It was recognized that most businessmen hate competition and want to make as much money as possible.

The Seventh Circuit also considered the contractual issues and damages. It reversed on both. With regard to damages, the Seventh Circuit found that the $54 million in damages was not reasonable and it was based on faulty opinions. Similarly, the reduction of the award by the district court to $12 million lacked a reasonable basis.

Analysis

The Seventh Circuit continues to lead the way in narrowly construing the antitrust laws. *Olympia* is a good example of this and shows that this circuit (and others) have granted monopolists greater and greater freedom in their business affairs. A monopolist has virtually no obligation to help competitors. According to the Seventh Circuit, as long as consumers are not inconvenienced, monopolists can compete just as hard as their competitors.

The Seventh Circuit, although paying lip service to the Supreme Court's opinion in *Aspen Highlands*, actually construed that opinion narrowly, limiting it to its facts. At best, according to *Olympia*, *Aspen Highlands* extends beyond its facts (if at all) only when it can be shown that the monopolist's cooperation with its competitors is necessary in order to have some sort of effective competition. Otherwise, a monopolist can switch policies and do whatever is necessary for its own business purposes.

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